S. HRG. 100-651

# THE SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988

## HEARING

BEFORE THE

## COMMITTEE ON SMALL BUSINESS
## UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

## S. 1559

THE SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988

APRIL 14, 1988

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# S. 1559, THE SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988

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THURSDAY, APRIL 14, 1988

U.S. SENATE,
COMMITTEE ON SMALL BUSINESS,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:10 a.m., in room SR-428A, Russell Senate Office Building, Hon. Alan J. Dixon (Acting Chairman) presiding.

## STATEMENT OF HON. ALAN J. DIXON, A. U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DIXON. Good morning, ladies and gentlemen. I apologize for the inconvenience I've caused you all. I pride myself on being an unusually punctual public person. Unfortunately, this morning there was a Subcommittee of the Banking Committee on Housing, a Subcommittee of the Armed Services Committee on Defense Industrial Base questions and this hearing. And in addition to that, my friend, the senior Senator from Connecticut, was offering an amendment to the budget bill on the Floor of the Senate that I was opposed to. Because it affected my State of Illinois, I was compelled to be there, and to make some brief remarks just now against it. So, it is unfortunate that these matters from time to time inconvenience fine people like yourselves, and I am apologetic to every one of you for that inconvenience.

This morning the Committee on Small Business will again consider concerns raised by changes to the Small Business Act brought about by section 921 of P.L. 99-661, the Department of Defense Authorization Act for 1987.

In July 1987 I introduced S. 1559 as the Small Business Federal Contracting Restoration Act of 1987. In it I sought to address the problems section 921 created for small businesses and Government procurement officials. I am pleased that much of the language I proposed has been adopted via amendment to other legislation. However, a most damaging provision, in my opinion, still remains.

That provision requires the SBA to review the number of contracts in certain industry categories held out for exclusive small business competition. If the small business set-aside rate is greater than 30 percent, the SBA is directed to reduce the appropriate size standards. It was expected by the authors of section 921 that fewer "small" businesses would result in fewer small business set-asides.

When the SBA did the required analysis, it determined that substantial size reductions would be necessary in all the construction industry categories to comply with section 921. Unfortunately, those same size standards are used to determine eligibility for SBA loans and other small business assistance programs. The result is that thousands of deserving companies will be unnecessarily deprived of government assistance. Furthermore, the SBA was not convinced that the intended effect would be achieved. Finally, the size standard reduction mechanism specified in section 921 provided no relief to three of the four industry categories.

The Small Business Competitiveness Demonstration Program suggested in the proposed amendment to S. 1559 was developed out of suggestions made at our last hearing by our first two witnesses. Testimony presented at today's hearing will determine whether this approach provides a workable solution to the problem of disproportionate set-asides without the adverse consequences attendant to size standard reductions.

[The prepared statement of Senator Dixon follows:]

Committee on Small Business
**United States Senate**

O P E N I N G  S T A T E M E N T

of

**SENATOR ALAN J. DIXON**

HEARING ON

Amendment in the Nature of a Substitute for S.1559, the
**"Small Business Federal Contracting Restoration Act of 1987"**
Establishing a
Small Business Competitiveness Demonstration Program

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Senator DIXON. Ladies and gentlemen, the first panel this morning will be Karen Hastie Williams of Crowell and Moring in Washington, former Administrator for Federal Procurement Policy, Office of Management and Budget; and E. Colette Nelson, director of the Government Relations Office of American Subcontractors Association in Alexandria. And we are delighted to welcome both Ms. Williams and Ms. Nelson to the table. Ms. Williams, would you proceed at your convenience?

## STATEMENT OF KAREN HASTIE WILLIAMS, ESQ., CROWELL AND MORING, WASHINGTON, DC

Ms. WILLIAMS. Thank you very much, Mr. Chairman. I would ask that the full text of my written statement be included in the record and in the interest of time, I will summarize my written statement.

Senator DIXON. I greatly appreciate that. It's a courtesy that we do appreciate. And your full statement will be placed in the record.

Ms. WILLIAMS. Mr. Chairman, I am pleased to be here this morning and to speak in favor of the Small Business Competitiveness Demonstration Program Act. As you just commented, when this Committee held hearings last fall, there was significant discussion of the possibility of developing a Pilot Program that would allow the use of the innovative procedures authority of the OFPP Act to advance competition among small businesses.

I believe that the fair proportion principle which requires industry-by-industry review of small business participation in Federal procurements is really the appropriate watchword for this Committee to consider as it looks at this program. The foundation of small business participation in the Federal procurement process is equity. I believe this Pilot Program can demonstrate the importance of equity in the procurement process.

Unfortunately, equity has not been well served by the current system. Set-aside regulations have been abused by some of the Federal agencies. Both during my time in Government and as a private practitioner, I have seen firsthand how some contracting officers have misused these provisions that were promulgated with the best of intentions by the Small Business Administration. If we look at the data from the Federal Procurement Data Center, we see historical patterns that reveal high levels of small business set-asides in industries that are dominated by small business companies. As the findings in your draft proposal indicate, many agencies have used this shortcut to meet small business goals instead of directing their resources to efforts to build small business participation in those industries that traditionally have not had much small business activity.

There are limited Government resources. I know you are keenly aware of that as you have the Federal budget amendments on the Floor this week, and see the Federal budget resources shrinking. So, these restricted resources have to be used and channeled carefully in terms of their use. These resources I believe should be used to increase small business opportunities in those industries without a traditionally high level of small business awards. I am convinced that there are talented small businesses across the full spectrum of services that the Federal Government needs. There is no reason,

therefore, why small business goals should be met only by those industries that have concentrations of small businesses.

I think that the lesson we have learned by looking at section 921 is that, while its goal of fair proportion is very laudable—and I certainly support its goal, problems have arisen in implementation. Your earlier bill did recognize that problem.

Size standard changes alone, however, will not correct the set-aside abuse problem. I, therefore, support the Committee's proposal to enhance unrestricted competition among small businesses and thereby increase procurement opportunities for all companies and industries that are dominated by small businesses.

The Committee draft would establish a 3-year test period for three specific industries: Construction, architectural and engineering, and refuse management. It makes a great deal of sense for the Congress to propose a very defined test period with defined industries and to keep the administrative mechanism very simple so that contracting officers, representatives in the small business community, and those in the large business community will fully appreciate and understand the Pilot Program.

I have included in my written statement some suggestions of specific areas where I think the demonstration program could be improved. There are several procedural areas where improvements could be made that will enhance the program and increase the chances for success and acceptance of the program.

I will briefly list my suggested revisions. First, I would recommend that the small business participation goal be stated as a specified fixed figure for each industry in each agency for each of the 3 years of the Pilot Program. I think this administrative simplicity would work to win over the contracting representatives in the Government and the small business community as a whole. I think it would provide a clean, clear way to test the effectiveness of the Pilot Program.

While this Committee is certainly in the best posture to judge what that figure might be, I would suggest to you that converting the goal in your draft of 200 percent of the governmentwide award to a fixed number would produce a reasonable goal of approximately 30 percent. The 30 percent number could be easily calculated by each agency and would avoid wasted hours in computing the more complex 200 equivalency factor. In addition, this 30 percent reflects, indeed, the real world 15 percent level of Federal contracts that are now going to small business.

Second, I would recommend that you broaden the measure of small business participation to include unrestricted competition, both 8(a) and 15(a) and set-asides, 1207 set-asides, any of the special small business preference programs, subcontracts, contracts to suppliers and joint ventures. I believe subcontracts in particular provide an important incentive to prime contractors to use more small businesses and will flow more dollars into the small business community.

Third, I think that another area that could be clarified is the intent to tally the participation of each industry on an aggregate basis for all contracts under the product and service codes that are within that industry.

Next, I think that the Administrator of OFPP in reporting to the Congress should take on several areas of responsibility. First, I would like to see him or her assess the test results from this Pilot. Second, I think that the Administrator should recommend to this Committee and to the related Committees of Governmental Affairs what permanent changes in law might be appropriate and also consider what broader application of the demonstration program might be appropriate.

I would be very happy, Mr. Chairman, to work with you and your Committee staff as you go forward with the demonstration program. I have some further technical suggestions and drafting suggestions that I would be happy to pass on to the staff.

I would be happy to respond to any questions you may have.

[The prepared statement of Ms. Williams follows:]

CROWELL & MORING

Testimony of

KAREN HASTIE WILLIAMS

Small Business Competitiveness Demonstration Act

before the

United States Senate

Committee on Small Business

April 14, 1988

KAREN HASTIE WILLIAMS
FORMER ADMINISTRATOR, OFPP

SUMMARY OF TESTIMONY
SMALL BUSINESS COMPETITIVENESS DEMONSTRATION ACT

I. Fair proportion principle requires industry-by-industry review of small business participation in federal procurements.

   A. Foundation of small business participation is equity.

   B. Set-aside regulations abused by some agencies:

      o Historical patterns reveal high levels of small business set-asides in industries dominated by small business companies.

      o Limited governmental resources should be directed to increasing small business opportunities in industries without traditionally high small business awards.

   C. Size-standard changes alone will not correct set-aside abuses.

II. Support Committee draft to enhance unrestricted competition and thereby increase procurement opportunities for all companies in industries with high concentrations of small businesses.

   A. Establish 3-year test period for three specific industries.

   B. Keep administrative mechanism simple.

III. Improvements to Demonstration Program

   A. Broaden measure of small business participation to include unrestricted competition, § 15(a) and § 8(a) set-asides, § 1207, any special preference programs, subcontracts, contracts to supplies and joint ventures.

      o all preference programs should be included for true test

      o subcontracts provide important incentives to primes to foster increased small business participation

B. Tally participation in each industry group by aggregating contracts under all relevant product and service codes

C. 30% goal for small business participation:

- o equivalent to 200% of current overall participation, i.e., 15%
- o same goal for each agency, each industry, each year
- o once achieve over 30% participation, then use unrestricted competition

IV. OFPP Report to Congress

A. Assess test results

B. Recommend what permanent changes in law are appropriate

C. Consider broader application of demonstration program

**SMALL BUSINESS COMPETITIVENESS DEMONSTRATION ACT:**

**LESS REGULATION, MORE OPPORTUNITIES**

Mr. Chairman and Members of the Committee:

My name is Karen Hastie Williams. I am a partner at the Washington law firm of Crowell & Moring. My law practice concentrates on issues of public contract law at both the federal and state levels.

As is true of any good Washington lawyer, I have had the privilege of government service. During my time in government, I developed a keen appreciation for public policy concerns and witnessed an equitable balancing of interests in the development of sound procurement policy.

The objective of increasing small business participation and competition in the federal procurement process is one that I endorse completely. My years in Government included service as Chief Counsel for the Senate Committee on the Budget and as the Administrator of the Office of Federal Procurement Policy within the Office of Management and Budget. From these perspectives, I had the opportunity to see firsthand the kinds of procurement policy issues with which you grapple today. I welcome the opportunity to comment on the "Small Business Competitiveness Program Act" and to review its potential impact on small business

procurement reform.

Introduction

As we discussed at Senator Dixon's hearing last fall, Congress has made major steps to enhance competition and diversity in small business procurement opportunities by adoption of the sound principle that small businesses should be represented in a fair proportion by industry within the ranks of federal contractors. Codification of that principle occurred with the enactment of Section 921 of the 1987 Defense Authorization bill. Now, more than a year has passed since Section 921 was enacted; its operation has been reviewed by SBA, the major contracting agencies and this Committee. Working with the Senate Armed Services Committee, modifications to small business procurement assistance programs in Section 921 were developed to clarify congressional thinking.

After the September hearing, Congress recognized that there was a need for additional guidance on Section 921 and included statutory and report language in the 1988/1989 Defense Authorization Act. These provisions were intended to simplify the recordkeeping process and to provide further procedural direction for SBA to issue regulatory adjustments with respect to size standards for certain industries, dominated by small businesses, in which small business set-asides aggregated more than 30% of total awards.

Even with these changes, however, it appears that further corrections are still needed to assure effective implementation of the fair proportion principle. Adjustments to size standards alone will not cure the current contracting abuses. Loading of small business set-asides onto industries with heavy concentrations of small businesses has produced distorted results with 60 and 70 percent set-asides in these industries when compared with less than 1 percent or 2 or 3 percent in other industries for procurement requirements within one agency. I strongly believe that greater small business participation can be achieved through reduction of regulation in general, elimination of automatic small business set-asides in industries with heavy concentrations of small businesses (like the three-industry groups designated in the Committee draft), and competition on an unrestricted basis, once a specified threshold level of participation is attained.

An innovative procedure to enhance small business opportunities can be developed along the lines of the "Small Business Competitiveness Demonstration Program Act" now being considered by this Committee to establish a three-year pilot program. The pilot program would test the validity of the fair proportion principle and would permit unrestricted competition to rationalize small business participation on an industry-by-industry basis within each agency.

Without a program like the proposed demonstration project, I am concerned that the federal government runs the risk of

concentrating its efforts on only one remedy, size standard adjustments. My concerns arise from experience in the private and public sectors. As a private practitioner, I have counseled companies with diverse interests--small and large businesses; construction and architectural and engineering firms; computer and system design companies; service organizations; majority-owned and minority-owned businesses--in connection with their participation in the federal contracts marketplace. As a Government Administrator, I had responsibility for enforcing and negotiating the goaling provisions of Public Law 95-507 with the federal agencies. In addition, I issued the regulations establishing the Small Business Subcontracting Program and the Women-owned Business Program. I am thoroughly familiar with the theory and practical impact of the "Rule of Two". All of these programs sought to increase opportunities for procurement awards to small business concerns. But, these strategies have met with mixed results and only modest success. Government policy must be flexible enough to evaluate its own shortcomings and to look for new, improved avenues to achieve its goals.

Key Elements of Competition Demonstration Program

The principle of fair proportion will permit the Small Business Administration, the agencies and potential contractors to establish the foundation for allocation on an industry-by-industry basis of small business opportunities throughout the federal

marketplace. Applying this theory to industries with large concentrations of small businesses, unrestricted competition should be the preferred method of obtaining government contracts. The pilot demonstration program recognizes that focusing on size standard changes alone, as is the case with Section 921 of Public Law 99-661, will not resolve the problem of the impacted industries. It is, rather, the excessive use of the set-aside mechanism, irrespective of size standard, that contributes to current abuses within the procurement system. Avoiding these abuses is, therefore, the focus of the demonstration project.

The competition demonstration strategy sets a specified small business participation level for each procurement agency on an industry-by-industry basis as measured by the prior year's achievement. Small business participation is defined as total participation by small businesses, including open competition and set-asides. Once the goal is achieved, then procurements are open to all businesses through unrestricted competition. If an agency fails to meet its goal, then special remedial techniques such as set-asides may be utilized. The competition demonstration strategy will likely produce a positive cumulative result. Over the 3-year test period, it is likely to increase small business participation and advance the principle of fair proportion by spreading awards by industry and by agency as advocated by the Congress.

The major features of the demonstration project include the following:

- Definition of "small business participation" includes open competition, set-asides under Section 15, minority set-asides and Section 1207 preferences.

- 200% of prior year's government-wide rate for small business participation set as goal for each reporting entity as percentage of total awards.

- Goal can be achieved through open competition or, if it is not the case based on the previous year's history, through open competition and a combination of remedial techniques. Remedial techniques include:

  -- awards to small business through set-asides under Section 15;

  -- awards to disadvantaged businesses through other than full and open competition, e.g., 8(a), 5% set-aside of P.L. 99-661, and any other specially targeted programs.

I would suggest that the competition demonstration strategy can be improved by two procedural changes which have the potential to enhance the success and acceptability of the program. First, I would recommend that the small business participation goal be stated as a specified, fixed figure for each industry, in each agency for each of the three years of the pilot program. The administrative simplicity of this approach will work to win over contracting representatives in government and the small business community as a whole. It will also provide a clean, clear way to test the effectiveness of the pilot program. While the Committee is in the best posture to judge what figure is appropriate, I would suggest that converting the goal in the draft of 200% of the

overall year's awards to a fixed number would produce a reasonable goal of approximately 30 percent. The 30% number will be easily calculable by each agency for each industry and will avoid wasted hours in computing the 200% equivalent for each industry in each agency.

In the real world, less than 15% of federal contracts are awarded currently to small businesses. Loading certain industries with 60 - 70% set-asides is unfair and irresponsible. To avoid these abuses, the 30% goal foretells a spreading by region and industry of assured work with the potential for much more in open competition.

Second, changing the scope of the goal would be useful. I would support the expansion of the definition of "small business participation" to include in the base open competition, Section 15(a), Section 8(a) and Section 1207 procurements as well as subcontracts, contracts with suppliers and joint ventures. The clarification of the application of "participation" to these relationships recognizes the importance they all play in relationships to prime contractors and to the flow of federal dollars into the small business community. This goes well beyond the monitoring feature in the draft to actual reporting, recording of these subcontracts, supplier contracts and joint ventures (limited partnerships). To maintain a valid test, I would also support elimination of the minority preference programs in the unrestricted competitions.

**Advantages of Competition Pilot Program**

From the agency perspective, the pilot program offers several significant administrative advantages. First, this procedure is greatly simplified when compared to the current complex mechanisms to lower size standards under Section 921 and potentially more simplified with a straight 30% goal. Second, control would be kept within the reporting entity, the organizational level most familiar with agency requirements, with the contracting community, and with actual opportunities for small business participation. Third, the agency could deploy its resources to concentrate on the use of set-asides for those industries that do not attain the specified participation goal.

From the perspective of the small business contractors, the opportunities for increased small business participation are a combination of open competition awards and special remedial techniques that would be reflected in actual prime contract and subcontract awards. Nothing in the competition demonstration program would preclude small business from winning 100% of all contracts awarded by any reporting entity in open competition. From the perspective of SBA and larger businesses, the expansion of small business participation to include a full range of contracting and subcontracting opportunities would enhance the likelihood that more federal procurement dollars would be flowing into the small business community. Moreover, the recognition of the importance of subcontracting and joint venture participation

would provide an excellent incentive for larger companies to contract with small business on a more extensive basis.

In sum, the competition demonstration approach would serve the interests of the Government, small and large businesses and test the market for small business participation in the designated industries, all of which are appropriate test vehicles in the presence of small business. Of course, this is not the only alternative. The experience of the Defense Department with the dollar threshold open competition program for the architectural/engineering community is another program consistent with the demonstration project that focuses on a percentage of total awards above which open competition must occur.

Committee Draft Establishes 3-year Test

Section 101 establishes a three-year pilot program beginning on January 1, 1989 and ending on December 31, 1991. These dates will provide adequate time for fiscal year award data to become available to each reporting agency from the Federal Procurement Data Center prior to both the commencement and the conclusion of the program. With three years of data, the program can provide a solid statistical sample to be judged on a fair and equitable basis.

Program Scope Limited to Three Industry Groups

Section 102 provides an explanation of the scope of the program. The Program ("the Program") applies to only certain limited contracts. Specifically, the Program applies to all contracts awarded for the product and service codes under the three categories designated in the statute during the pilot period--January 1, 1989 to September 30, 1991--by each agency reporting to the FPDC. In Section 106, these three designated industry groupings are further defined by the applicable product and service codes as follows:

| Industries | PSC Codes |
|---|---|
| (i) Construction (including dredging) | Y111, Y119, Y121, Y122, Y123, Y124, Y125, Y126, Y127, Y129, Y131, Y139, Y141, Y142, Y149, Y151, Y152, Y153, Y154, Y155, Y159, Y161, Y162, Y163, Y164, Y165, Y169, Y216; Z216 |
| (ii) Refuse systems and related services | S205 |
| (iii) Architectural and engineering services (including surveying and mapping) | R111, R112, R113, R114, R115, R116, R117, R118, R119, R121, R122, R123, R124, R129, R204, R211, R212, R213, R214, R215, R216, R219, R404; T002, T004,T008, T009, T014 |

To assure an orderly transition for contract awards in these three major industry groupings, the Program will apply to all solicitations, requests for proposals and other contract actions (including modifications) initiated on or after January 1, 1989. Agency contracting officers, the SBA, and industry will have due notice from the effective date of this legislation to January 1, 1989 that this test procedure will be applied prospectively after

that date. By delaying the test program activation date until January 1, 1989, several positive factors result. First, OFPP will have an opportunity to monitor the base year statistical data recorded by the FPDC and distribute it to the agencies. Second, each contracting agency shall receive the prior year's award data well in advance of the effective date in order to establish their procurement plan. Third, each contracting agency can then compare the past performance of the agency with its agency's goal for the upcoming year in each PSC identified in Section 106.

Section 102(c) also recognizes the need for focusing agencies' resources on those industries with little historic participation by small business.

Small Business Participation Goal

Section 102 declares the goals for the Program. It requires that each reporting agency shall establish an annual goal 200% greater than the overall, government-wide goal of small business participation as measured by the aggregate annual dollar volume for each industry group by product and service code listed in Section 106.

Section 107 further defines "small business participation" to include all awards over $25,000 to small business companies through all methods of procurement, including unrestricted competition; Section 15(a) and Section 8(a). I believe it would benefit the government to expand the definition to include other

special small business and small disadvantaged business set-aside programs authorized by law, subcontracts, supplier contracts and joint ventures measured by dollar volume.

Section 103 provides that priority should be given to contract award through unrestricted competition to achieve the stated goal. It is expected that these three industry groupings, all of which are dominated by small business firms, will likely achieve the stated participation rate simply through unrestricted competition in all of the industry groups. To the extent that this goal is achieved, it will belie the need for any remedial techniques, such as the small business set-aside program, to assure small businesses a fair proportion of contracts. The structure of the three industry groupings, identified in Section 106, and the measurement of aggregate industry group awards provide an excellent test arena. While the Committee draft excludes 8(a) and other minority preference programs, I would suggest that the exclusion may indeed work a hardship. If small minority programs are not part of the test mechanism, the results will be hampered and ultimately opportunities lost.

Section 102(a) establishes a procedure whereby each agency looks back to the prior year's procurement activity within that agency in each of the three categories as further defined by each of the product and service codes listed in Section 106 to determine whether the 20% goal has been met through unrestricted competition. I would interpret this section to mean that in the event the agency has fallen short of the small business goal in

the prior year, then it can make an annual adjustment and use a combination of unrestricted competition and remedial techniques to achieve the difference between the prior year's awards and the goal for the upcoming year.

Section 103(b) establishes the "remedial techniques" available to the Program. They include the small and small disadvantaged business set-aside programs, and Sections 15(a) and 8(a) of the Small Business Act. I would recommend expansion of these techniques to include other special set-aside programs authorized by law, subcontracts, contracts with suppliers and joint ventures. Section 104 anticipates that each reporting agency shall submit data to the OFPP Administrator on all subcontracts awarded to small business firms over a threshold level of $25,000. This reporting should be supplemented to include these contracts in the base to provide a more accurate reflection of total small business participation in the federal marketplace.

Among other remedial techniques, the Congress should embrace the concept of targeted competition in order that the marketplace for small businesses can remain fair and level. The use of advertising and public relations can enhance the opportunities for small business. Subcontracts, joint ventures and major suppliers are also likely to be impacted. The environment for use of small businesses in the federal marketplace is strong. The goal of fair proportion can be achieved with a redirection of SBA's energies. Under the look-back procedure of Section 102(a), the agencies are armed with a vital tool, the measurement process and the

circumstances necessary to support a combination of unrestricted competition and remedial techniques, namely the extent to which the stated participation goal is not achieved in the annual procurement of goods and services.

Program Evaluation

Section 105 establishes an evaluation procedure for the test program. At the end of the three-year period, the OFPP Administrator is directed to report to the Congress on these innovative procurement procedures. To the extent that the results demonstrate high levels of small business concentration within an industry category and high levels of small business participation (above the stated percentage) based on unrestricted competition, the Administrator is directed to recommend legislative changes for reduction of unnecessary restricted competition.

But, Congress should also consider permanent authorization of the Program at the end of the test period for industries in which the fair proportion is clearly met through unrestricted competition. For those product and service codes that are not included in the test program but which achieve greater than the stated small business participation in an agency through unrestricted competition as reported to OFPP by FPDC, Congress should consider expansion of the Program and authorize its application to these other product and service codes.

Fair Proportion Goal by Industry Is Attainable

The competitiveness demonstration program advocates measuring small business participation in each agency on an industry basis utilizing the product and service codes. These are the industry measures used by the Federal Procurement Data System. It is already the standard used by the procurement process to monitor procurement activity at the agency level and, in practice, is gradually replacing the SIC codes for contractor identification purposes. 1986 data from the Federal Procurement Data Center show major concentrations of small business activity within certain industries above the 70% level. These are the abuses on which the test program can focus.

The Program would also measure industry performance by agency rather than on a government-wide basis for each industry. This further breakdown is absolutely essential if smaller businesses are to have the opportunity to grow and prosper in every aspect of government procurement.

Delineation by industry has several other positive aspects:

- simplifies the data collection process and assures the accuracy and verifiability of the data;
- reduces the potential antagonism among agencies with respect to participation in small business programs;
- prods the contracting officers, competition advocates and small business advocates into a more aggressive procurement program for small business;

- increases the likelihood that each agency will diligently seek to balance the procurements within its agency among set-asides in open competition rather than assuming another agency will cover this period;

- refines the triggering mechanism to an agency-by-agency basis to enhance the opportunities for open competition;

- allows agency to measure actual participation levels with one-year backwards snapshot of actual procurement data. If open competition awards are high, other remedial techniques are not necessary to meet the goal. This mechanism is closer in time and reflects actual efforts and performance rather than an arbitrary dollar standard. It also recognizes the differences among agencies in terms of requirements. It encourages creativity in terms of meeting stated goals.

**Rule of Two Waiver**

Section 103 recognizes that certain procurement laws and regulations, including the total and partial set-aside provisions, are inconsistent with a test program based on procurement through unrestricted competition. To permit an accurate test of unrestricted competition as a fair measure of small business participation, 48 C.F.R. Part 19.5 and 48 C.F.R. § 236.600 may be waived for the purpose of this three-year pilot program with respect to procurement actions in these four industries. These limited waivers will permit the test program to go forward unhampered by the artificial barriers of procurement regulations which establish a preference for use of set-asides in industries

dominated by small businesses.

Under current law, whenever a contracting officer determines that there is a reasonable expectation that two or more small business concerns will submit bids at reasonable prices, the contract is to be set aside for small businesses. Without a waiver, the "Rule of Two" would deny increased small business participation through the open competition mechanism.

I believe that the "Rule of Two" is an artificial mechanism that has been used by the agencies to abuse industries in which small businesses dominate. This waiver is necessary to provide a fair test for the pilot program. Without this mechanism, I believe a different picture would emerge with respect to small business participation in key agencies.

Removal of this regulatory impediment for three years for the industries in the demonstration program period will provide a reasonable control experiment on the use of the "Rule of Two" and permit Congress to assess whether more comprehensive legislation is necessary to maximize small business participation through open competition.

Contracting officers will still be authorized to use set-asides authorized by "the Rule of Two", however, as part of a remedial technique to implement set-asides under those circumstances in which an agency has not achieved its small business participation goals. The Rule of Two will also remain available and fully operable for procurements outside the three-named industries.

The Section 103 rationale is equally applicable to the § 203 provisions to repeal the mandatory size standard changes amendments. Perhaps suspension or waiver instead of repeal will permit the Committee to conduct a pure pilot, but provide for reinstatement of Section 921 unless permanent law changes are recommended.

Conclusion

With this demonstration program, I believe that there will be a significant pragmatic increase in small business participation levels. The simple procedures will serve as an incentive to agencies and SBA to work constructively with the small business community toward this goal.

Mr. Chairman, I very much appreciate the opportunity to testify this morning. I am prepared to respond to any questions that the Committee may have.

# # #

Senator DIXON. I thank you. I think we will hear from Ms. Nelson, and then we will see what you both have to say. But I want you to know we appreciate your valuable contribution, and we will work closely with you. Thank you.

I'm delighted to see my distinguished friend, the Senator from Missouri, Senator Bond, here now. And we will hear from Ms. Nelson, and then we'll see if there are any questions from him as well.

**STATEMENT OF E. COLETTE NELSON, DIRECTOR, GOVERNMENT RELATIONS, AMERICAN SUBCONTRACTORS ASSOCIATION, ALEXANDRIA, VA**

Ms. NELSON. Thank you, Mr. Chairman.

Mr. Chairman, first of all, let me apologize for Mr. Sullivan not being able to be here today. He had a business crisis that required him to return home at the last minute.

Senator DIXON. Well, tell Mr. Sullivan I'd rather have you here anyway, Ms. Nelson. [Laughter.]

Ms. NELSON. He's my president-elect. I think I'm going to restrain myself. [Laughter.]

Senator DIXON. You better not tell him then.

Ms. NELSON. No.

Like Karen, I would like to get immediately to the point and say that ASA also supports your proposed substitute to S. 1559.

We are opposed to the size standard changes mandated by section 921 of P.L. 99-661. We have given this some serious consideration and we have reviewed the record from the 1986 debate and from the debate last year. In our perception, section 921 was supported by two very diverse groups. The first group opposed set-asides, at least in the construction industry and perhaps across the board, but recognized the political difficulties of taking on the Rule of Two. On the other side, also supporting section 921, were those who support set-asides, but were concerned that the opponents to set-asides may one day be successful and wanted to mitigate some of the side effects that are created by set-aside programs.

Together these two very diverse groups created what we perceive as a Rube Goldberg program. Like Mr. Goldberg, a lot happens that was not intended. We go through some very convoluted procedures to reach a reduction in set-asides in specific industries, which we all support, but at the same time it has a lot of side effects, such as those mentioned in your opening statement. We are particularly concerned about the impact on various small business assistance programs.

Senator DIXON. Yes.

Ms. NELSON. One of the things that we are particularly concerned about is the impact of P.L. 95-507. All these companies who would now be considered large would have to comply with the subcontracting requirements, which can be very detailed for relatively small firms.

In addition, as you also mentioned, Mr. Chairman, unlike Mr. Rube Goldberg's projects, section 921 may not even achieve its desired goals. We believe that new entrants into the construction market will very quickly fill the vacuum created by these now

large firms moving out. And as this occurs, SBA would be forced to continue to move down the size standards to the point that many of the firms that would now be small, would not be even able to perform on Federal contracts.

You may recall that when the ASA witness, Sharon Fischer, testified before you in September, she noted that in her trade, which is concrete, the proposed size standard at a half million dollars would allow her to operate just one crew for three-quarters of a year. Now, a firm that can only operate for three-quarters of a year is not a very viable firm. And, of course, what are those employees of that firm going to do for the quarter of the year where they are not working?

For all those reasons, again, ASA would support the provision in your proposal to repeal the size standard reduction in section 921 of P.L. 99-661.

The difficulty that we've reached is that if section 921 won't solve the problem, what will? In September we suggested a program that would allow a contracting officer on a Federal construction project to use set-asides on a selected basis—that is, when he has to protect the market in which he is operating from predatory activities of other-than-small firms.

We appreciate the fact that you obviously listened during that hearing, Senator. It's nice to know that the system works. And we appreciate that.

We do support the Pilot Program in your proposal. We believe that it is a more equitable solution to achieving the goal of limiting set-asides in industries where set-asides are probably not necessary at all. And we certainly think that construction is one of those industries. We believe very strongly that small businesses will get their fair share of the Federal construction market in open competition. It is an industry that is dominated by small businesses.

Senator DIXON. Sure.

Ms. WILLIAMS. If we are right, then Congress should consider eliminating all set-asides in these industries. And if we're wrong, we're obviously going to have to reassess our assumptions and our policies. Within ASA we call it our "put up or shut up proposal." You will very definitely send us home if we have to come back and correct this. We're very confident that it will work.

In summary, if I may, just to say again, that we are opposed to the adjustment of size standards and, therefore, support your repeal provision, and that we also strongly support your proposed demonstration project.

[The prepared statement of Ms. Nelson follows:]

Statement of

AMERICAN SUBCONTRACTORS ASSOCIATION

to the

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

on

S.1559
SMALL BUSINESS FEDERAL CONTRACTING RESTORATION ACT OF 1987

April 14, 1988

AMERICAN SUBCONTRACTORS ASSOCIATION 1004 DUKE STREET, ALEXANDRIA, VA 22314-3512
(703) 684-3450

Statement on S.1559
the "Small Business Federal Contracting Restoration Act of 1987"

The American Subcontractors Association is a national trade association with more than 7,200 firms representing all major construction trades in 59 chapters. In addition to its individual company members, ASA represents 15 other specialty trade associations with members of their own (See Appendix A).

ASA is the only national organization that speaks exclusively for the interests of construction subcontractors. ASA is dedicated to improving general business conditions for subcontractors through unified and cooperative actions.

The overwhelming majority of ASA members are small businesses. According to ASA membership records, 80 percent of our members are small businesses as defined by existing size standards for specialty trade contractors. In addition, many ASA members perform construction for the federal government. Sometimes they serve as prime contractors, contracting directly with the federal government. More often, they serve as subcontractors, dealing with the government only through a prime contractor. Therefore, we have a direct and real interest in Section 921 of Public Law 99-661 and Section 809 of Public Law 100-180, as they relate to small business size standards and small business set-asides, as well as any resulting implementing regulations.

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Under the existing SBA small business size standards, approximately 80 percent of ASA members are "small businesses." If the size standards proposed by SBA on December 17, 1987, were to go into effect, only 15 percent of ASA members would be considered small businesses. That is, 4,680 companies that are now small will no longer be considered small. According to SBA, 50,000 firms may be in the same position.

It is ASA's observation that the adoption of Section 921 was supported by many in both the private sector and those in Congress for two very different reasons.

First, many in the small business community and Congress saw the provisions of Section 921 as an opportunity to broaden the range of small business participation in the federal procurement market. In the view of some, federal agencies do not expend the effort to increase small business participation in some market areas because they are able to meet their "small business goals" through attention to market segments where small businesses are the natural winners.

Other proponents of Section 921 supported its provisions in order to curtail the number of set-asides in industry categories in which they felt a disproportionate number of small business set-asides are found. This is particularly true of the various organizations that comprise the construction industry. Because of the ease of entry into the construction industry and the size of the majority of its firms, the construction industry generally

believes that small business participation in the federal construction market can be achieved without set-asides. Indeed, many of the original proponents of Section 921 have strongly held views that all preferential procurement in the construction industry should be abolished.

Reduction in Size Standards

The heart of Section 921 can be found in the provision that directed the reduction in size standards for four designated industries such that no more than 30 percent of the contracting opportunities would be subject to set-aside and the remaining 70 percent would be available for open competition. ASA believes that this provision will not fail to achieve its purported goal of reducing set-asides but will have numerous unexpected side-effects as well. Therefore, ASA supports the repeal of the reduction in size standards mandated by Section 921.

Those advocating this provision clearly believe that there are too many set-asides in these industries, which act to exclude firms that are other than small businesses as defined by SBA. This is the result of the tendency of contracting officers to use the construction industry, which is predominantly small businesses, to meet a significant portion of its overall goals for small business participation within the agency or department.

What the proponents of Section 921 were seeking, in our view, was a limitation on set-asides. But, because of the natural adverse reaction that could be expected from other segments of the small business community to the elimination of or modification of the so-called "Rule of Two" or a direct cap on set-asides, the proponents chose to achieve their goal through indirection. Thus, their goal was to reduce the number of "eligible" small business firms so that the number of participants would shrink to the point to which they would no longer be available to meet contracting opportunities set-aside for exclusive competition as small businesses.

But this "Rube Goldberg" method of achieving a simple goal may not only fail to achieve its purported objective, it may have some unintended side effects.

The reduction in size standards is based on the assumption that "by eliminating from eligibility the larger small business firms winning 8(a) and set-aside contracts it will be more difficult to set-aside contracts. Consequently, the proportion of set-asides as a percent of total federal procurement dollars would become lower."

ASA believes this assumption is fundamentally flawed and that size standard changes will not reduce the level of set-asides. Indeed, in its July 14, 1987, report to the Congress ("Advisability and Feasibility of Implementing Section 921 of

Public Laws 99-591 and 99-661"), SBA cited as a serious problem "the uncertainty of the effectiveness of the lower standards to reduce the level of set-aside and 8(a) contracts." And, again, in March 7, 1988, letter to Rep. E. De la Garza, SBA's Associate Administrator for Procurement Assistance wrote, "SBA cannot guarantee that the proposed changes will achieve the 30 percent goal."

ASA does not believe the inability or infeasibility of SBA to achieve this goal is caused by the desire to thwart the will of Congress, as has been suggested by some. Indeed, we believe that SBA has developed a proposal based on its best estimate of the size standards likely to achieve the 30 percent goal. The problem is with the premise on which the proposal is based.

SBA's reductions are based on historical patterns that do not and cannot take into account all available small business firms or the entry of new firms into the market. We believe that more very small firms will enter the federal set-aside market as others are displaced from the program. As more and more eligibles enter the federal market, it may be necessary to repeatedly ratchet down the size standards to reach the 30 percent goal. At some point, the size standards will become so low that firms eligible as "small businesses" will not be viable companies eligible to perform a federal contract. This already may be true for some specialty trades under the proposed rule.

As noted above, ASA is not only concerned that the reduction in size standards will not achieve the stated goal, but that it will have some unexpected and unwanted side effects as well.

SBA's size standards are used to determine eligibility for a myriad of small business assistance programs. The most commonly used by construction contractors are:

- o SBA Loan Programs, which are designed to help small businesses who need financial assistance but cannot obtain help from conventional sources; and
- o SBA Surety Bond Guarantee Program, which helps bridge the gap between small contractors, private commercial sureties, and government contracting agencies.

In addition, construction firms that are no longer "small" will be required to comply with the subcontracting requirements of Public Law 95-507. That is, such firms will be required to develop a subcontracting plan for small and minority business participation, when performing a federal contract over $1,000,000. Such plans must include:

(1) A goal for subcontracting to small and minority businesses;

(2) The name and job description of the employee assigned to administer the subcontracting plan;

(3) A description of the efforts planned to meet the goal;

(4) Assurance that the contractor will require certain of its subcontractor's to meet the same requirements;

(5) Assurance that the contractor will cooperate with appropriate government agencies in determining compliance; and

(6) A recitation of the records the contractor will keep to attain and demonstrate compliance.

The burden of compliance with this regulation is significant for firms that are relatively small.

In addition to the impact on eligibility for federal small business assistance programs, the reduction in size standards will impact on construction firms' eligibility for state and local small business assistance programs, many of which reference SBA's size standards. We understand that SBA is reviewing the extent of this problem in their review of comments and development of final regulations.

ASA recognizes that not every small business construction firm takes advantage of every small business assistance program. Indeed, most firms probably never take advantage of any of these programs. But the programs are there when needed. And many firms that believe they will never need such a program, find themselves using them when they experience a business calamity, such as a market change or financial crisis.

For all of these reasons, ASA supports the provision in the substitute for S.1559 (Discussion Draft: March 31, 1988) that would repeal the size standard reduction mandated by Section 921.

Small Business Competitiveness Demonstration Program

The question remains, however, how can the goal of assuring small business participation be met?

First, let us assure you that ASA strongly supports efforts to encourage small business participation in federal procurement. After all, 80 percent of our members are small businesses.

However, we believe this goal can be met without limiting competition for federal procurement. As stated above, we in the construction industry generally believe that, because of the ease of entry into the construction industry and the size of the firms that comprise it, small business construction firms would be highly successful in the federal market even without the use of set-asides on a routine basis. This belief was reinforced by the results of a survey conducted by ASA in March of 1987.

The results of the survey indicate that the smaller the specialty trade contractor, the more likely it is to perform some federal construction (See Appendix B). For example, 73.8 percent of the firms with annual volume of less than $500,000 perform federal construction; 55.3 percent of the firms with annual volume between $2 and $5 million perform federal construction; but only 28.6 percent of the firms with annual volume over $25 million perform federal construction.

Undoubtedly, a part of this disparity is the result of set-aside programs. But we do not believe that to be entirely the case. First, the breaking point for higher participation in the

federal market is not at the $7 million definition for small business of specialty trade contractors. In addition, the amount of federal construction, as measured by a percentage of annual sales volume of those that perform federal construction, did not differ significantly among the range of company sizes. In each case, it averaged about 15 percent of annual sales volume.

In a September 1987 hearing before this Committee, ASA proposed as a substitute to the reduction in size standards mandated by Section 921, the adoption of a program that would allow a contracting officer on a federal construction project to use set-asides on a selected basis--when he must protect the market in which he is operating from the predatory activity of other than small firms.

We believe that the feasibility of such a program can be determined by the enactment of the "Small Business Competitiveness Demonstration Program" set forth in the substitute for S.1559 (Discussion Draft: March 31, 1988). Under this proposal, contracting opportunities in three industry groups (i.e., construction, refuse systems, and architectural and engineering services) would be made available on an unrestricted basis. Small business participation rates would be monitored closely on at least a quarterly basis. If the small business participation rate fell below a specified threshold, set-asides could be reimposed to restore small business participation. The

small business participation rate that would trigger the imposition of the remedial set-asides would be twice the government-wide small business participation rate for the prior fiscal year, or 30 percent based on a total small business participation rate of 15 percent in fiscal year 1987.

ASA is confident that the proposed "Pilot Program" will clearly demonstrate that small businesses in the construction industry can receive their fair share of the federal construction market under full and open competition. Therefore, we strongly support the proposal.

Summary

Let us again emphasize that ASA does not believe that the problem with SBA's proposed dramatic reduction in size standards is a problem of methodology as much as it is a problem of a false premise. We believe that the assumption underlying the authorizing legislation and the proposed implementing regulation requiring a reduction in small business size standards is fundamentally flawed. There is no evidence to suggest that a reduction in size standards will lead to the purported goal of reducing the number of set-asides in the specified industries.

In addition, the reduction in size standards would have a widespread effect on businesses that are currently defined as small by making them ineligible for a myriad of small business assistance and procurement programs at all levels of government.

Thus, ASA supports the proposed substitute for S.1559, which would repeal the reduction in size standards mandated by Section 921 and substitute a "Small Business Competitiveness Demonstration Program" designed to determine if small businesses in the designated industry categories can compete and win contracts in open competition for federal contracts.

ASA stands ready to work with this Committee to improve the effectiveness of the procurement system and to increase participation in that system by all segments of the small business community.

Appendix A

American Subcontractors Association
National Associations' Council Members

ADSC: The International Association of Foundation Drilling Contractors

American Architectural Manufacturers Association

American Institute of Steel Construction

Architectural Precast Association

Association of the Wall & Ceiling Industries - International

Ceiling and Interior Systems Construction Association

Concrete Sawing & Drilling Association

Institute of the Ironworking Industry

Insulation Contractors Association of America

National Association of Elevator Contractors

National Glass Association

National Ornamental & Miscellaneous Metals Association

National Roofing Contractors Association

Painting and Decorating Contractors of America

Appendix B

## American Subcontractors Association Survey on Federal Construction*

Question #1:
Do you perform work on federal construction projects?

Yes: 62.7%
No: 37.3%

Question #2:
What is your approximate annual sales volume?

| Annual Volume | Total Respondents | Respondents Who Perform Federal Construction | Respondents Who Do Not Perform Federal Construction |
|---|---|---|---|
| Less than $500,000 | 13.2% | 73.8% | 26.2% |
| $500,000-$2 million | 36.8% | 71.4% | 28.6% |
| $2 million-$5 million | 27.3% | 55.3% | 44.7% |
| $5 million-$10 million | 12.3% | 56.8% | 43.2% |
| $10 million-$25 million | 8.2% | 48.0% | 52.0% |
| Over $25 million | 2.2% | 28.6% | 71.4% |

Question #3:
What percentage of your annual sales volume is on federal construction?

Range: 00.01%-90%
Mean: 18.8%
Median: 15%
Mode: 10%

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* Methodology: A survey questionnaire on federal construction practices was sent by the National Office of the American Subcontractors Association to 1,000 construction subcontractors randomly selected from its membership list on March 27, 1987. The completed forms were returned to the ASA National Office between April 3 and April 17, 1987. Completed questionnaires were returned by 322 of the 1,000 members to which the survey was distributed, representing a 32.2 percent response rate.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Appendix C

MAR - 7 1988

Honorable E (Kika) de la Garza
House of Representatives
Washington, D.C. 20515

Dear Congressman de la Garza:

Thank you for your letter of February 22, 1988, forwarding materials from Mr. M. R. Sullivan, Jr., of the American Subcontractors Association, and requesting the views of the Small Business Administration (SBA).

Mr. Sullivan's letter addresses the SBA proposal to reduce small business size standards for the construction industries, pursuant to statutory requirements of Public Laws 99-591 and 99-661. As Mr. Sullivan noted, the legislative requirement is to reduce size standards to a level which will likely result in a level of combined small business set-asides and 8(a) contracts of approximately 30% of the value of awards in respective industries. The law also requires that the industries be addressed by individual, four-digit Standard Industrial Classification codes. Mr. Sullivan states that carrying out the reduction of size standards will:

1. remove the eligibility of thousands of construction firms for SBA programs;

2. reduce minority participation in federal construction programs;

3. remove the eligibility of thousands of firms for state and local construction where the SBA size standards are applied; and,

4. not achieve the goal of reducing set-asides and 8(a) contracts to a level of 30%.

The letter further suggests that set-asides should certainly be reduced, though not by this method; and, that set-asides really should be abolished.

In response to these points we note the following:

1. Our estimate, as published in the proposed rule, is that approximately 50,000 firms of about 509,000 will lose their small business status.

2. While there will probably be a reduction of 8(a) contracts awarded to small disadvantaged business, there will be an unchanged value of construction awards, though an increased proportion will be unrestricted offerings. This may result in reduced awards to minority business.

3. Any program using SBA size standards will, necessarily, have a reduction of eligible offerors. Several local government organizations have commented to us about this consequence and we are engaged in evaluating the facts to determine what impact this should have on our proposed rule.

MAR 21988

4. SBA cannot guarantee that the proposed changes will achieve the 30% goal. Nonetheless, the proposed standards are our best estimate of the size standards likely to achieve 30%. There are a number of factors involved in making decisions to use small business set-aside or 8(a) contracting. Certainly, however, the availability of eligible firms to bid on the work, an availability which will be significantly reduced by the proposed standards, must have major impact on the volume of work under set-aside or 8(a). While our methods are designed to achieve the 30% figure, we cannot be certain of the precise effect. We can confidently predict that set-asides and 8(a) will be reduced.

Regarding Mr. Sullivan's contention that set-asides should be abolished we can only note that language specifically identifying construction was incorporated into the Small Business Act after initial enactment because of the contention at the time that the construction industry was not included in language calling for a fair proportion of Federal contracts for small business. Mr. Sullivan's proposal is thus inconsistent with the Small Business Act and the purpose of Public Laws 99-591 and 99-661. Our experience has been that individual small businesses often support continuance of small business set-asides while associations urge that the program be abolished.

As Mr. Sullivan mentions in his letter we are carrying out the requirements of law. The comments which he provided separately are included in the evaluation of public comment which is being performed now. We are, of course, required to address all substantive comments and explain our decision when we publish the final rule. Mr. Sullivan's comments were extensive and will be given full consideration.

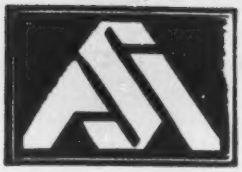
I trust this response will be of use to you. Please call on me if I can provide any further information.

Sincerely,

Monika Edwards Harrison

Monika Edwards Harrison
Associate Administrator
for Procurement Assistance

Appendix D



February 16, 1988

Monika Edwards Harrison
Chairperson
Size Policy Board
U.S. Small Business Administration
1441 L Street, N.W.
Room 600
Washington, D.C. 20416

Re: Proposed Rule on Small Business Size Standards for Construction and Surveying Services Industries and Subcontracting Limitations (52 Fed. Reg. 47937 (December 17, 1987))

Dear Ms. Harrison:

The American Subcontractors Association is a national trade association with more than 7,000 firms representing all major construction trades in 57 chapters. In addition to its individual company members, ASA represents 15 other specialty trade associations with members of their own (See Attachment A).

The overwhelming majority of ASA members are small businesses. According to ASA membership records, 80 percent of our members are small businesses as defined by the existing size standards for specialty trade contractors. Many of these firms rely on small business assistance programs or the availability of these programs for their special needs. In addition, many ASA members perform construction for the federal government. It is apparent then that ASA members have a direct and real interest in the proposed rule cited above.

## Reduction in Size Standards

### The Assumption Behind the Authorizing Legislation and the Proposed Implementing Rule is Flawed

SBA is required by the terms of the FY '87 Continuing Resolution (Public Law 99-591) and the FY '87 DOD Authorization Act (Public Law 99-661) to reduce the size standards for four industry groups "to a size that will likely reduce the number of contracts which

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may be set aside to approximately 30 percent of the value of the contracts to be awarded." As cited in the proposed rule, the reduction in size standards is based on the assumption that "by eliminating from eligibility the larger small business firms winning 8(a) or set-aside contracts it will be more difficult to set-aside contracts. Consequently, the proportion of set-asides as a percent of total federal procurement dollars would become lower."

ASA believes this assumption is fundamentally flawed and that the size standard change will not reduce the level of set-asides. Indeed, in its July 14, 1987 report to the Congress ("Advisability and Feasibility of Implementing Section 921 of Public Laws 99-591 and 99-661"), SBA cited as a serious problem "the uncertainty of the effectiveness of the lower standards to reduce the level of set-aside and 8(a) contracts." The reductions are based on historical patterns that do not and cannot take into account all available small business firms or the entry of new firms into the market. We believe that more very small firms will enter the federal set-aside market as others are displaced from the program. As more and more eligibles enter the federal market, it may be necessary to repeatedly rachet down the size standards to try to reach the 30 percent goal. At some point, the size standards will become so low that firms eligible as "small businesses" will not be viable companies able to perform a federal contract. This already may be true for some specialty trades under the proposed rule.

In any event, it appears unlikely that the proposed size standard reduction will meet the stated goal of reducing the level of set-asides in the targeted industries. Therefore, ASA is pursuing legislation to repeal the "30 percent rule" provision of Section 921. We urge SBA to support our efforts in this regard.

Alternatives to a Size Standard Reduction

ASA commends SBA for recognizing that there may be alternative methods of controlling the level of set-asides in federal procurement. Several such alternatives have been discussed.

For example, some in the construction industry have recommended the use of a single size standard for each of Major Groups 15, 16, and 17. ASA does not believe the stated objective would be reached using this alternative. If a single size standard were used for Major Group 17, for example, some trades (e.g., 1791, Structural Steel Erection) would have set-asides well below the 30 percent level, while others (e.g., 1742, Plastering, Drywall,

Acoustical, and Insulation Work) would have set-asides well above the 30 percent level. In addition, this alternative is the subject of the same false assumption used to devise the current proposed size standard reduction.

In its July 14, 1987 Report to the Congress, SBA discussed the possibility of lowering the level of set-asides and 8(a) contracts by setting either an agency-wide or government-wide cap on these awards. ASA believes that this is an unnecessarily complicated, inefficient and potentially expensive procedure for achieving the stated goal.

Instead, ASA has recommended to the House and Senate Small Business Committees legislation that would establish a pilot program to determine whether small businesses would get their fair share of federal construction contracts without the use of set-asides. It is our belief that small businesses would get their fair share and that small business set-asides could be eliminated, except in very limited circumstances. ASA urges SBA to support our efforts in this regard.

Impact on Small Businesses

ASA believes that SBA's analysis of the impact of the proposed reduction in size standards on small businesses is understated. The analysis acknowledges that the proposed rule would affect businesses within the construction and surveying industries in terms of their eligibility for SBA programs, such as the loan guarantee program.

However, SBA fails to address the impact of the reduction in size standards in a number of important areas. For example, it does not point out that firms that are no longer "small" under the proposed size standards would have to comply with the subcontracting requirements of Public Law 95-507. That is, such firms would be required to develop a subcontracting plan for small and minority participation, when performing on federal contracts.

SBA also fails to discuss the impact of the reduction in size standards on minority firms, many of whom rely heavily on federal programs, such as Sections 8(a) and 1207. Size standards also are used to determine eligibility for these programs.

Finally, SBA fails to note that many state and local governments reference SBA's size standards in their own small business preference and assistance programs. Thus, many construction

contractors who do not participate in federal procurement or small business assistance programs, suddenly may find themselves ineligible to participate in state and local small business programs.

## Subcontracting Limitations

The proposed rule states that "In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials)." ASA believes this is an acceptable percentage for the many specialty trade categories. Most specialty contractors, even when serving as prime contractors, perform the great majority of work with their own forces. We agree that this provision will help assure that small firms will not act simply as brokers for other-than-small firms on special trade construction.

The proposed rule states that "In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the cost of construction." The rule of thumb in the industry is that subcontractors perform an average of 80 percent of the actual on-site work on commercial construction. It would, thus, seem that that the proposed rule mirrors industry practice and would help assure that small general contracting businesses do not act simply as brokers for other-than-small firms.

It should be noted, however, that there is a trend in the construction industry toward general contractors serving primarily as brokers between the owner and the subcontractors. Such general contractors, while offering management and coordination services, may perform little, if any, on-site construction--and certainly no where near the 15 percent required by this provision. SBA should monitor this trend in the construction industry to determine if it needs to be reflected in this rule.

## Summary

ASA believes that the assumption underlying the authorizing legislation and the proposed implementing regulation requiring a reduction in small business size standards is fundamentally flawed. There is no evidence to suggest that a reduction in size standards will lead to the purported goal of reducing the number of set-asides in the specified industries.

In addition, the reduction in size standards would have a widespread effect on businesses that are currently defined as small by making them ineligible for a myriad of small business assistance and procurement programs at all levels of government. ASA recommends that SBA support legislation to repeal the required size standard reduction and substitute in its stead a system that would eliminate small business set-asides in industries where small businesses would receive their fair share of the federal procurement market without this special assistance.

Sincerely,

E. Colette Nelson
Director of Government Relations

Attachment

Senator DIXON. Well, I appreciate very much the important contribution you have both made, both last year and this year.

I just want to say that size standard reduction is another example of doing something in haste and not doing it right. You know the history of this—I hope everyone in the room does—that this was put on the DOD authorization bill I guess the year before last, if my memory serves me. And at the last moment, those of us from the Senate who had absolutely no knowledge of it were exposed to this in the conference between the two Houses. There were so many contentious things before us in the conference which had very important impacts on the bill, that finally some of us—I think my distinguished friend from Michigan, Senator Levin and myself were kind of stuck with this on our side, and we did the best we could. My recollection is that we put off the effect of the bill for a year. Some of this history is completely from memory. If I'm off a little, I don't intend to misrepresent the facts.

Then we came back here last year. We tried to correct what we could. And my recollection is that with the exception of this 30 percent business, I think we did a fair job of cleaning it up, and that went through fairly easily last year. Now we are addressing this remaining concern.

And as I say again, it demonstrates how not to do legislative business. I don't mean that critically of anybody in the House, but it was not the way to address this very, very delicate question. I don't pretend that this Demonstration Program is the only solution, but at least we'll get an opportunity to look at it for 3 years.

You folks who have some expertise in the field, when you come here and help us like this, you do an important public function. I'm always reminded of this fact when I hear people critical of lobbyists; the fact is that they teach us a lot. The things that you do, when you come here like this, are very helpful. I mean that sincerely. We thank you.

My friend from Missouri, Senator Bond, do you have any questions of these witnesses?

## STATEMENT OF HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Well, thank you, Mr. Chairman. I am delighted to hear Ms. Nelson describe this as a Rube Goldberg machine because the more I look at it, the more bewildered I've become. I was reminded of the old adage that in these confused and chaotic times, if you're not thoroughly confused, you're just not thinking clearly. [Laughter. ]

And I wondered if I had missed something because whatever the evil is that was done last year does not seem to be a reasonable way to approach it. I am struck with the fact, as has been indicated previously, that certainly this might open the door for some who would still fit under the size requirements to have a more open field or less competition. On the other hand, it may bring in others.

I would appreciate either of the witnesses perhaps going into the basic question as to what exactly was the evil at which this provision that we seek to change was directed. Ms. Williams.

Ms. WILLIAMS. I think, Senator, that the evil that——

Senator BOND. You can put that in quotes.

Ms. WILLIAMS. Yes. The evil that the Congress was trying to address was the question of the imbalance, if you will, with respect to disproportionate set-asides in particular industries. The data showed concentrations of set-asides in industries in the private sector where concentrations of small businesses exist. As one looked at the way the Federal Government buys goods and services, many of the agencies were meeting their small business goals—that were mandated by other pieces of legislation—by awarding set-aside contracts in those industries where one could easily meet a goal because there were lots of small businesses. This procedure was fed by the juxtaposition of the Rule of Two which mandated an automatic set-aside with the industry configuration.

Originally, section 921 focused on fair proportion of contracts for small businesses and advocated they should be spread across all industries. Awards to small businesses should not be concentrated in any one industry. That was a very positive principle. I support that principle. I think that your amendment supports that principle.

What happened in the implementation stage, though, was a focus on getting to 30 percent set-asides. The current amendment takes a giant step. It recognizes that the proper focus is small business participation. One needs to address that issue and not just set-asides. Accordingly, one looks at small business awards in open competition. One looks at subcontracts in order to determine the level or participation. Once an agency achieves a 30 percent level of participation, then the agency goes to open competition.

I am firmly convinced that the data will show after this Pilot Program that the Government has even more small business participation with unrestricted competition.

In summary, the evil that was being addressed in section 921 was the failure to look at small business awards on an industry-by-industry basis across the board, which really had not been done before.

Senator BOND. Do you believe that this proposed measure will adequately address that need?

Ms. WILLIAMS. I think that it will address that problem. I think that it will give us a fair test of this proposition. If you look on an industry-by-industry basis, you will see that small businesses need help in certain industries and do not need help in other industries. And you will be able to concentrate the very limited Federal Government resources in those areas where small businesses need that extra preference program. I think that is what this proposal will address.

Senator BOND. Do you have any comments on that, Ms. Nelson?

Ms. NELSON. I would concur, Senator. Let me add that one of the problems that we've seen is that there is a perception that small business participation is synonymous with small business set-asides. And that's just not true. At least in our industry, small businesses are very competitive.

Senator BOND. Thank you, Mr. Chairman.

Senator DIXON. I thank the Senator from Missouri, and I thank both of you for your valuable contributions. And I'm apologetic again for keeping you waiting. Thank you very much.

Now we have the Honorable Robert P. Bedell and Monika Edwards Harrison. Would you folks come up here please? Monika Edwards Harrison, Associate Administrator for Procurement Assistance, Small Business Administration here in town, and the Honorable Robert P. Bedell, Administrator, Office of Federal Procurement Policy, Office of Management and Budget here in town. We are delighted to have you both, and we thank you.

If you would be as kind as your predecessors and accommodate us by placing your remarks in the record and keeping your statement brief, we would greatly appreciate it.

Do you have a preference about who goes first? Gentlemen before ladies, Mr. Bedell. [Laughter.]

**STATEMENT OF HON. ROBERT P. BEDELL, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, WASHINGTON, DC**

Mr. BEDELL. I didn't get to vote, but I'll be glad to. I would like to submit my statement for the record, and I apologize for getting it up here so late. I'm sure you haven't had much of a chance to look at it.

Senator DIXON. It's in my book.

Mr. BEDELL. Good.

Senator DIXON. Thank you very much.

Mr. BEDELL. What I tried to do there is to lay out as many of the problems as I could with the test that is contained in the proposed substitute for S. 1559, the test program itself. We favor test programs generally for procurement matters. We think a lot can be done with a test program to demonstrate what the pros and cons of particular ideas are that are very difficult to convince executive agencies of or the Congress of. You and we are rightly skeptical about changing things until we know, and many times it's just impossible to know without performing tests. So, we generally support test authority, and we would support it here because this is an ideal situation for it.

We have made what I hope are some constructive suggestions on how the test may be improved, and we'd be delighted to work with you and your staff on further improvements to it.

Second, and as a premise for your test program, I should observe that the reduction in the amount of set-aside dollars through reduction of the size standards is just bizarre. And we have commented on that to SBA as they struggle to implement that provision of law through a rule which we thought was a sincere effort to be faithful to what the law was trying to do but constrained in how much sense they could make out of the provision of law itself. We think it is substantially flawed and should be changed.

My problem frankly with this test, the more I think about it, is this. The bill would essentially require the Administrator of the Office of Federal Procurement Policy to devise a test, and the sections in your bill are really instructions as to how that test should be devised. That's fine. But if the test would involve the waiver or changing of any statutory provisions, that test itself must then come back to the Congress and go through the legislative process and be enacted before that test can take effect.

Our success with these test proposals, under the way that the OFPP statute is now drafted, is 0 for 1. We sent one up and we never saw it again. We don't know what happened to it.

Senator DIXON. It disappeared. A lot of things like that happen around here. [Laughter.]

Mr. BEDELL. You can understand why that happens because the Committees with the most interest in whatever it is that is proposed to be waived get it because it is referred to them, and they look at it and say, hey, that's something we did. That's the end of it.

So, our success rate has not been high. If we are going to send up a test that involves the waiver of any statutes here, your test program may not ever see the light of day. I'm sure you'll be pushing for it, but our experience has not been very successful here.

If, on the other hand, no waiver of statutory requirements is involved, we now have the authority, working with the departments and agencies, to change the rules and regulations around to permit a test to be conducted. Those have been successful, and we're conducting some now.

But, again, if a statute, is required to be waived—any statutory provision—we've got to send it back up here to go through the legislative process. Meanwhile, you've got section 921 and the reduction of size standards coming at you in a fairly close timeframe. You are now enjoined, I think, until May 31 to issue a final rule. That doesn't say when it has to be out, but there is some impending nature to this process. And if we have to go through a statutory test in order to provide a substitute, then we've got a problem.

What I would suggest as an alternative, since what you are really doing is instructing us to draft a test, we would be delighted now, regardless of what happens to this legislation, to sit down with you all and Bill and Monika and others and try to draft a test, the kind of test that this proposal would be instructing us to do. If it involves the waiver of statutes, fine. We will submit that under the OFPP authority, and then you can proceed with that if you choose. But that way, we'll at least have a real test in front of us, not the instruction to draft a test. We will have a real test.

On the other hand, if it doesn't involve the waiver of statutes in order to conduct this test, we can proceed. And regardless of what this legislation would do, we would then be able to proceed with the test undoubtedly faster than if we had to go back through the test ratchet. So, I make that offer.

Senator DIXON. Our staff, I assure you, will be talking to you about how to accomplish this in a way that would be cooperative with your thought process.

Mr. BEDELL. Very good.

Other than that, I've eaten up the 5 minutes that your letter of invitation asked me to confine myself to. I think I've covered the main points. There are specifics in here.

Senator DIXON. You have been very helpful, and I assure you staff will be contacting you right away.

Mr. BEDELL. Very good. Thank you.

[The prepared statement of Mr. Bedell follows:]

STATEMENT OF ROBERT P. BEDELL
ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE
ON S. 1559
"SMALL BUSINESS COMPETITIVENESS DEMONSTRATION
PROGRAM ACT OF 1988"

April 14, 1988

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to present the views of the Office of Federal Procurement Policy and the Administration on S. 1559, a bill that if enacted, would be known as the "Small Business Federal Contracting Restoration Act of 1987."

We have also reviewed a proposed amendment in the nature of a substitute to S. 1559 that was enclosed with your letter inviting me to testify. That proposed amendment would be known as the "Small Business Competitiveness Demonstration Program Act of 1988."

The test program in S. 1559, (as amended) would be carried out under the authority of Section 15 of the Office of Federal Procurement Policy Act (41 U.S.C. 413). We believe that these procedures can be improved upon as discussed below.

The Program in the proposed substitute would require a test of ways to achieve a more "balanced" distribution within industry categories of Federal contracts awarded to small businesses. Currently, small business participation is concentrated in a few industry groups, even though small businesses could participate more in additional industry categories.

This unevenness, which may be desirable in some instances or unavoidable, exists, in part, because small business participation is calculated and reported on an agency-wide and government-wide basis.

As a result of changes to the Small Business Act by Section 921 of the Defense Acquisition Improvement Act of 1986 P. L. 99-591 on October 30, 1986, (amended by P.L. 99-661 on November 14, 1986) the SBA will reduce the size standards in four industry categories that define what a small business is for certain purposes including eligibility to participate for contract awards that are set aside for exclusive bidding by small businesses. SBA will reduce these standards to a size that would have resulted in setting aside exclusively for small businesses approximately 30% of the dollar value of contracts in the prior year. We believe that this process is hopelessly flawed for reasons that we will discuss later.

While there were undoubtedly many reasons for these changes in the law, three appear to us to be paramount: (1) limiting to approximately 30% the amount of dollars in four industry categories that would be set aside for exclusive small business bidding; (2) requiring that there be more small business participation in industry categories where there was little participation; and (3) prohibiting awards in excess of "a fair market price" under the small business set aside program.

In our view, section 921 and the proposed SBA rule to implement it will not accomplish the first congressional purpose; will probably not achieve the second; and S. 1559 but not the proposed substitute for it will frustrate the third, which we believe is critically important. In other words, there are serious flaws in section 921 that should be corrected; but the proposed changes in S. 1559 and the proposal to it in the nature of a substitute are also flawed.

Both S. 1559 and its proposed substitute would repeal certain of the not yet effective provisions of Section 921, and the proposed substitute for S. 1559 would provide for a three year test instead. To limit set asides for small businesses in three designated industry groups where small business participation is substantial--as it clearly is in some industries--the proposed substitute would require full and open competition (i.e., no small business set asides) as long as the

"goals" for such groups were met in each calendar quarter. If these "goals" were not met for any quarter, the proposed substitute would authorize set asides to meet them. (Even if small business participation was substantial, the proposal would provide that full and open competition would not apply to the so-called 8(a) program or to the program required by section 1207 of Public Law 99-661).

In the first year of the test--calendar year 1989--the goals in these three industry groups would be 200% of "the small business participation percentage rate" in Fiscal Year 1987--approximately 21% -- and thereafter of the prior fiscal year. (The data for this determination was not available until December, 1987, which means that the assumed availability of this type of data to "trigger" important provisions in the proposed substitute may not be realistic).

While the percentages would be the same number, the percentage for the CY 1989 goal would be set after **excluding** all contracts of less than $25,000. Contracts of less than $25,000 are currently required by section 15(j) of the Small Business Act, as amended, to be set aside exclusively for small business participation. As a result, the set asides in CY 89 could actually increase in these designated industry groups.

On the other hand, to increase small business set asides in industry categories where small business participation has been below agency goals, the proposed amendment in the nature of a substitute to S. 1559 would require each participating agency to annually establish new small business goals for "selected" products and services in each one of four designated industry categories that are selected by the heads of the participating agencies in conjunction with the SBA Administrator.

It is important that set-asides in Federal procurement be used wisely; that we not jeopardize public trust when we give to some an advantage over others. We should, as an instinct, rely on competition in the market place to assure that the taxpayer and the citizen receive the best value. Perhaps the most important "reform" of section 921 was the prohibition on awards under set aside procedures where the contract would exceed a fair market price. We believe that this is critical to the success of the program; that it is critical to the procuring agencies; that it is critical to the taxpayer; and that it is critical to small businesses. We support the proposed substitute in this regard and oppose rescission by S. 1559, even if other necessary corrections would go unaddressed as a result.

The goal of these set-aside programs should be to assist the development of enterprises that can successfully compete in commercial markets without set aside programs or other statutory

provisions that limit competition.

We believe that a test of new approaches to encourage small business development makes good sense.

We believe that improvements need to be made to the proposed amendment to S. 1559.

## OFPP's TEST AUTHORITY

Under OFPP's present statutory authority, when it is necessary to waive the application of a provision of law in order to carry out a test, the Administrator must submit notice of the proposed test program to the House of Representatives and to the Senate, and request that the committees of jurisdiction take such action as may be necessary to make such provisions of law inapplicable to the test program.

Since the creation of OFPP in 1974, no such test requiring congressional action has been enacted. Although only one proposal has been submitted, the prospects for successful consideration by Congress have appeared so remote that I and my predecessors at OFPP have decided to work on matters with a higher likelihood of success.

Nonetheless, we believe that testing new procurement ideas is a good one and that the test in Title I of the proposed amendment to S. 1559 makes sense. We would like to work with the Committee to make it better.

We also recommend that the proposed substitute to S. 1559 be revised--or that the OFPP Act be revised--to provide the Administrator with enhanced testing authority to adequately test the Program envisioned by this legislation. We suggest that the Committee should consider amending it as proposed in a bill called "The Procurement Test Act of 1987." A copy of that proposal is attached to this statement.

## AGENCY PARTICIPATION

Section 107 (a) of the proposed amendment to S. 1559 defines a "participating agency" for purposes of conducting the three year test, to be any agency that reports its procurement actions to the Federal Procurement Data Center. This would include virtually all agencies of the Executive Branch having procurement authority -- approximately 70 Departments and agencies.

We believe that a proposal may be sufficiently tested in a more cost effective manner with fewer participants. Since eight agencies account for nearly 97 percent of the contract dollars expended by the Federal Government, we suggest that the

Administrator of OFPP be authorized to test with less than all agencies participating.

By limiting the number of participants, we believe the test may be better controlled; and that the costs of conducting it may be reduced.

DESIGNATED INDUSTRY GROUPS

Section 102(a) of the proposed amendment to S. 1559 would limit the test of restricted small business set asides to "designated industry groups." The phrase "designated industry groups" is defined in section 106 of the proposed draft to include construction (including dredging); refuse systems and related services; and architectural and engineering services (including surveying and mapping).

Section 106 of the proposed substitute would also specify the Federal Procurement Data System product and service codes within each of the "designated industry groups" for which the goals would be set and for which the contracts over $25,000 could be set aside.

We suggest that the sections of Title I be redrafted to make it clear, for example, when the provisions apply to all groups and when they apply to each (see for example, Section 103(b)).

Meanwhile, the procedure for establishing small business participation goals utilizes SIC codes. We believe that the Committee should adopt the SIC code as the standard for this goaling and the demonstration program.

PARTICIPATION GOALS

We think that a goal of small business participation in these groups of 200% of the previous fiscal year's government-wide small business participation may be too high. This goal is also artificial because the bill and its substitute would provide that some small business participation is really not small business participation. The definition of "Small business participation" in section 107(b) of the proposed substitute should be revised to count all small business participation not just some. Similar changes should be made to other sections of the proposed substitute as well.

Furthermore, if an agency has attained its small business participation goal for one of the three designated industry groups described in section 106 of the proposed substitute then full and open competition should be required for procurement in that group, as section 103(a) of the proposed substitute would require. However, set asides pursuant to Section 8(a) of the Small Business Act or section 1207 of Public Law 99-661 should not continue in this situation.

To permit or require set asides under those two programs even after small business participation in such group exceeds 42% could substantially undercut the purpose of the limitation and significantly complicate the procurement process and the "score-keeping."

Assuming that the participating procuring agencies want unrestricted competition in these designated industry categories after realistic small business participation levels have been reached, they should get it. That should be their incentive for attaining those goals. They should not be faced with continuing set aside requirements in two other programs. And we should not be surprised to find a reduced incentive to meet the goals in this test if they must.

## REPORTING OF SUBCONTRACTING ACTIVITY

Public Law 95-507 amended the Small Business Act to require prime contractors and subcontractors, othe than small businesses, receiving a Federal prime contract or subcontract over $500,000 ($1 million in construction) to submit a plan for subcontracting with small and small disadvantaged businesses. The proposed bill requires all prime contractors and subcontractors making awards in the designated industry groups to report if they award subcontract awards in the amount of $25,000

or more during the term of the Program. This would also include reporting by small business prime contractors and subcontractors of their subcontract awards over $25,000.

This method of reporting would provide more insight to small business participation because more subcontracts below the first-tier are awarded to small businesses. On the other hand, an onerous reporting burden may be placed on prime contractors and subcontractors, including small businesses, and excessive administrative costs incurred by the executive departments and agencies. The costs associated with devising this "simplified" reporting system should be considered carefully.

## ARCHITECT-ENGINEER SERVICES DEFINITION

The proposed substitute would amend section 901 of The Federal Property and Administrative Services Act to revise and expand the definition of architectural and engineering services.

The definition would not only include the professional services of an architectural or engineering nature as defined by state law, services that require the approval of a licensed person and such other professional services of an architectural and engineering nature, but also includes surveying and mapping and other "incidental services."

We are not aware of a need for this proposed expansion of the definition of architect and engineer services and question its desirability. Under the expanded definition, a number of "incidental services" would no longer be subjected to price competition. While we understand that quality of service is an important factor in contractor selection, we also believe that the cost of such services should be the critical element of the selection process.

## WORKABILITY OF THE TEST

In addition to the comments above, there are other problems with the proposed test program.

1. Data Requirements. Information concerning small business participation is critical to the intended functioning of several of the sections of the proposed substitute. That information may not today be available in the time contemplated by the proposal.

Furthermore, the proposal would require "[M]odifications to the agency's solicitation practices...at the beginning of the second fiscal year quarter after the close of the fiscal year quarter in which any of the required goals were not attained." This "lag" of 90 days should permit the data to be obtained, but it may not permit reaction and implementation by contracting

personnel.

2. Phasing. Section 103(a) of the proposed substitute would require unrestricted competition (perhaps) in a designated industry group "...if the participating agency has attained its small business participation goal." (The draft could be construed to require unrestricted competition only after the goals were met for all of the designated industry groups, but we assume each such group is to be treated individually for purposes of this requirement). What "small business participation goal" must be met before the (qualified) unrestricted competition requirement kicks in? The goal from the prior fiscal year quarter? From the previous calendar year since this test is run on a calendar year basis? And, how are the goals in section 102, which are determined on a fiscal year basis, applied to a calendar year test?

These types of questions need to be addressed or they may frustrate the purposes of the proposal and of any test conducted. Too often before in these set aside programs, legislative ambiguities have undone legislative purposes.

That concludes my prepared remarks, Mr. Chairman. I will be pleased to respond to any questions that you or your colleagues may have.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 31 1987

Honorable James C. Wright, Jr.
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Reform of the Federal Acquisition System has been a continuing priority of this Administration. The Federal Government spends over $200 billion annually through this highly complex system, governed by countless laws and regulations. There is a continuing need to simplify and improve the ability of Executive Branch agencies to acquire goods and services as economically and as efficiently as possible.

The Congress recognized this need when enacting P.L. 98-191, the Office of Federal Procurement Policy Act Amendments of 1983. Section 15 of the Act, as amended, authorizes the Administrator for Federal Procurement Policy to develop innovative procurement methods and procedures to be tested by selected executive agencies. When the Administrator determines that, in order to carry out such a test, it is necessary to waive the application of any provision of law, the Act requires that the Administrator submit notice of the proposed test program to the Government Operations Committee of the House of Representatives and the Committee on Governmental Affairs of the Senate, and request that such committees take action as necessary to provide that such provision of law does not apply with respect to the proposed test program.

I am forwarding today proposed legislation, that if enacted, would enhance the authority of the Administrator to develop and carry out test plans and provide for efficient disposition of such proposals by the Congress. This legislative proposal is part of the Administration's legislative program as described in the Office of Management and Budget's Management Report of the United States Government--Fiscal Year 1988. The bill amends section 15 of the OFPP Act to provide a procedure for notification of Congress of a test plan. The proposal, if enacted, would require amendments to the rules of both Houses of the Congress to provide that a joint resolution to adopt the test plan be introduced in each House upon receipt of a test plan from the Administrator. The test plan would then be referred to the appropriate committees of each House. Each committee would then have 75 days of continuous session to consider the plan and resolution or be discharged. With either a

committee report or discharge after 75 days, the resolution would be placed on the calender of the House involved to ensure consideration of the resolution.

Enactment of the enhanced testing proposal would be a significant step in improving the authority of the Administrator to carry out an effective testing program while ensuring Congressional involvement in the reform of the Federal Acquisition System.

Sincerely yours,

JAMES C. MILLER III

James C. Miller III
Director

Enclosure

A BILL

To enhance the procurement test authority of the Administrator for Federal Procurement Policy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as "The Procurement Test Act of 1987".

Section 15 of the OFPP Act (41 U.S.C. (413)) Tests of Innovations Procurement Methods and Procedures, is amended by striking out subsections (a), and (b) in their entirety and substituting in lieu there of new subsections (a) through (h) to read as follows:

"Section 15(a)(1) The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. The innovative procurement methods and procedures tested under this subsection shall be consistent with the policies set forth in section 2 of this Act. In developing any program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to —

"(A) ascertain the need for and specify the objectives of, such program;

"(B) develop the guidelines and procedures for carrying out such program and the criteria to be used in measuring the success of such program;

"(C) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under such program;

"(D) select the appropriate executive agencies or components of executive agencies to carry out such program;

"(E) specify the categories and types of products of services to be procured under such program; and

"(F) develop the methods to be used to analyze the results of such program.

"(2) A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of the executive agencies selected to carry out such program.

"(b) If the Administrator determines that it is necessary to waive the application of any provision of law in order to carry out a proposed program to test innovative procurement methods and procedures under subsection (a), the Administrator shall transmit notice of the proposed program and a test plan to the Congress, together with a declaration that action is necessary to provide that such provision of law does not apply with respect to the proposed program. The notification to Congress shall include a description of the proposed program (including the scope and purpose of the proposed program), the procedures to be followed in carrying out the proposed program, the provisions of law affected, any provision of law the application of which must be waived in order to carry out the proposed program, and the executive agencies involved in carrying out the proposed program.

"(c) The notification and test Plan submitted to Congress by the Administrator shall be promptly referred to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate.

"(1) Except as provided under subsection (e) of this section, a procurement test plan shall be effective upon approval by the President of a resolution (as defined in subsection (e)) with respect to such plan, if such resolution is passed by the House of Representatives and the Senate, within the first period of 90 calendar days of continuous session of Congress after the date on which the plan is transmitted to Congress.

"(2) For the purpose of this section -

"(A) continuity of session is broken only by an adjournment of Congress sine die; and

"(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

"(3) (A) Under provisions contained in a procurement test plan, any provision thereof may be effective at a time later than the date on which the plan otherwise is effective.

"(B) A procurement test plan which is effective shall be printed (1) in the Statutes at Large in the same volume as the public laws and (2) in the Federal Register.

"(d) Subsections (e) through (h) of this section are enacted by Congress -

"(1) As an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions with respect to any test plans transmitted to Congress and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(e) For the purposes of subsections (d) through (h) of this section, "resolution" means only a joint resolution of the Congress, the matter after the resolving clause of which is as follows: 'That the Congress approves the procurement test plan numbered _____ transmitted to the Congress by the Administrator on _____ 19_____'. The blank spaces therein are to be filled appropriately. The term does not include a resolution which specifies more than one procurement test plan.

"(f) Resolutions shall be introduced and referred:

"(1) No later than the first day of session following the day on which a procurement test plan is transmitted to the House of Representatives and the Senate under subsection (b) of this section, a resolution as defined in subsection (e) of this section, shall be introduced (by request) in the House by the Chairman of the Government Operations Committee of the House, or by a Member or Members of the House of Representatives designated by such chairman; and shall be introduced (by request) in the Senate by the Chairman of the Governmental Affairs Committee of the Senate, or by a Member or Members of the Senate designated by such chairman.

"(2) A resolution with respect to a procurement test plan shall be referred to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be. The committee shall make its recommendations to the House of Representatives or the Senate, respectively, within 75 calendar days of continuous session of Congress following the date of such resolution's introduction.

"(g) If the committee to which is referred a resolution introduced pursuant to paragraph (1) of subsection (f) (or, in the absence of such a resolution, the first resolution introduced with respect to the same procurement test plan) has not reported such resolution or identical resolution at the end of 75 calendar days of continuous session of Congress after its introduction, such committee shall be deemed to discharged from further consideration of such resolution and such resolution shall be placed on the appropriate calendar of the House involved.

"(h)(1) When the committee has reported, or has been deemed to be discharged (under subsection (g) of this section) from further consideration of a resolution with respect to a procurement test plan, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to by any Member of the respective House) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. The motion shall not be subject to amendment, to a motion to postpone, or a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the resolution shall remain the unfinished business of the respective House until disposed of.

"(2) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than ten hours, which shall be divided equally between individuals favoring and individuals opposing the resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is passed or rejected shall not be in order.

"(3) Immediately following the conclusion of the debate on the resolution with respect to a procurement test plan, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

"(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a procurement test plan shall be decided without debate.

"(5) If, prior to the passage by one House of a resolution of that House, that House receives a resolution with respect to the same test plan from the other House, then—

(A) The procedure in that House shall be the same as if no resolution has been received from the other House; but

(B) the vote on final passage shall be on the resolution of the other House".

Senator DIXON. Ms. Harrison.

**STATEMENT OF MONIKA EDWARDS HARRISON, ASSOCIATE ADMINISTRATOR FOR PROCUREMENT ASSISTANCE, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC**

Ms. HARRISON. Mr. Chairman, I had an ulterior motive in asking that Mr. Bedell testify first and that is because in my statement, which is so short that it is, in fact, a summarization on its own, we simply concur with most of the comments which were made by OFPP.

Senator DIXON. I want to congratulate you. That is one of the shortest statements I've ever seen in a committee hearing. You're to be envied. [Laughter.]

Ms. HARRISON. It's actually the shortest statement I have ever submitted for any hearing anywhere. [Laughter.]

Senator DIXON. I'm going to frame this. [Laughter.]

Ms. HARRISON. We have tacked our comments on to OFPP's. And we did have some of the same questions Mr. Bedell submitted in his longer prepared testimony regarding specific technical questions. So, I think we also would like to be involved with staff in clarifying those provisions.

The one thing that I would like to say is that certainly we as the agency who is charged with carrying out the mandate of section 921 favor any legislative relief which removes from our responsibility the need to adjust size standards downward to achieve something that we think will not happen—that is, a reduction of set-asides.

Senator DIXON. In other words, if I may interrupt, section 921 isn't going to work. You need some kind of an alternative solution to the problem.

Ms. HARRISON. That's correct.

Senator DIXON. We don't know for sure whether this is it. We'll work with you to see if we can find it. That's reasonable.

Ms. HARRISON. That's correct.

I testified before the House Small Business Committee I believe 2 weeks ago now in a fairly lengthy hearing in which they were looking at comments we had received on our proposal for section 921 and information that we had as to continuing feasibility questions. And we indicated that we just didn't think that was the way to go. So, we are happy to see some other approach put on the table.

[The prepared statement of Ms. Harrison follows:]

SBA U.S. Small Business Administration Washington, DC 20416

TESTIMONY OF

MONIKA EDWARDS HARRISON

ASSOCIATE ADMINISTRATOR FOR PROCUREMENT ASSISTANCE

SMALL BUSINESS ADMINISTRATION

BEFORE THE

COMMITTEE ON SMALL BUSINESS

UNITED STATES SENATE

APRIL 14, 1988

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I APPRECIATE THE OPPORTUNITY TO PRESENT TESTIMONY ON BEHALF OF THE SMALL BUSINESS ADMINISTRATION ON S. 1559, "SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988," WHICH AUTHORIZES THE CONDUCT OF A PILOT SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM.

PRIOR TO MY TESTIMONY YOU WILL HAVE RECEIVED TESTIMONY FROM THE OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP). THE PROVISIONS OF S. 1559 IMPACTS, IN LARGE PART, ON FEDERAL PROCURING AGENCIES AND TO A LESSER EXTENT ON THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE SMALL BUSINESS ADMINISTRATION. SBA CONCURS WITH THE CONCEPT OF S. 1559 BUT SHARE MANY OF THE SAME RESERVATIONS OUTLINED BY THE OFPP ABOUT THE OPERATION OF THE TEST PROGRAM; i.e., WE ARE UNCLEAR AS TO THE SPECIFIC INTENT AND DIRECTIVE ENVISIONED BY SOME PROVISIONS OF THE BILL AS CURRENTLY PROPOSED. NONETHELESS,

WE ENDORSE THE CONCEPT OF LIMITING SET-ASIDES IN CERTAIN INDUSTRIES WHEN EXCESSIVE LEVELS OF SMALL BUSINESS SET-ASIDE AND 8(a) AWARDS HAVE BEEN REACHED. WE FAVOR THE UTILIZATION OF SOME MEASURE OTHER THAN THE ADJUSTMENT OF SIZE STANDARDS AS THE PROPER MECHANISM FOR ADDRESSING THE EXCESSIVE LEVEL OF SET-ASIDES AND ACKNOWLEDGE THE RELEASE FROM UNWIELDY LEGISLATIVE PROVISIONS INCLUDED IN SECTION 921 OF PUBLIC LAW 99-661. CONSEQUENTLY, WE GENERALY ECHO THE TESTIMONY OF THE OFPP AND REQUEST THE OPPORTUNITY TO CONSULT FURTHER WITH MEMBERS OF THE COMMITTEE AND COMMITTEE STAFF TO RESOLVE OUR CONTINUING QUESTIONS ABOUT CERTAIN TECHNICAL ASPECTS OF THIS LEGISLATION.

THIS CONCLUDES MY PREPARED STATEMENT MR. CHAIRMAN. I WOULD BE PLEASED TO ANSWER ANY QUESTIONS THE COMMITTEE MAY HAVE.

Senator DIXON. You know, my recollections keep on flooding back. I'm going to ask that the staff correct me if I'm wrong, but I now believe I remember that the Small Business Committee in the House rejected this whole idea before it ended up being on the DOD authorization bill. I believe that's a correct characterization. Then it ended up on the bill after the Committee rejected it. Now, I think that's right. I apologize if I'm wrong, but that's my recollection.

The Senator from Missouri, Senator Bond.

Senator BOND. I would just invite either of you to make any further comments that you have on how we deal with the problems. Is there anything further that we should be doing beyond this measure that we have before us?

Mr. BEDELL. I would point out instead, if I may, two things that would cause us some concern. First, S. 1559, as it was originally introduced, would have repealed a provision which would limit the awards in set-aside areas to no greater than a fair market price. We think that is critical. The proposal that is a substitute did not include that. We think that is the right way to go and we strongly support the proposal in that regard. Efforts to tinker around with ensuring the taxpayer that they're getting a fair market price in this is, we think, the wrong way to go. And if things moved in that direction, we would have major problems with that.

The second thing is, again because of the phasing here, there are really three titles to this proposal, as I've read it. The first one is what we've been talking about. The second is the repealer of the 30 percent size standard reduction which we've criticized, not that part of the bill, but the rule itself. And the third part is an expanded definition of architects and engineers. Let me wander off onto that for a second.

We do not know why that expanded amendment is needed. What it does for the things that are covered by the expanded definition is favor quality over price. We basically support price dominance, full and open competition as an instinct, and we think that we should here as well. And we are just not aware of the case that has been made to expand that definition. So, the third title is one that troubles us.

Senator DIXON. If I may butt in at that point in time, I'll discuss that with staff, but we keep on getting the same themes in different Committees. I was one of the principal sponsors of the Competition in Contracting Act. That bill was worked in this Committee, and was also sequentially referred to the Armed Services Committee. We literally spent many, many hundreds of hours on that. A lot of people were involved. Senator Quayle, as I recall, and Senator Levin, Senator Bingaman, the Chairman and Ranking Member of this Committee were all very much involved.

To make a long story short, we came back last year and put quality into consideration again because the defense industry was saying, everybody can make it cheaper by giving up quality. We are now having oversight hearings in a lot of the Subcommittees of the Armed Service Committee saying, we want you to look at both.

I think that is the point: anybody can make it cheaper. Nobody denies that. But there has to be some kind of a value system which you employ to determines whether you're getting the best buy for

the dollar. I expect that's an administrative thing that no legislator can suggest.

We want to hear from you about what you think we ought to do. I would yield to staff and your expertise in that. But we do want to say that it's not just price all the time. Anybody can make it cheaper; we all know that.

Mr. BEDELL. And I totally agree with you. The fact is that when we say price competition now, under the CICA type provisions, quality is taken into account. That is one of the ways that you evaluate how you are going to make awards. And we think that is appropriate. What this provision would do, at least as I read it, is say that you ought to look first at quality and then go negotiate the price after you've selected a contractor on the basis of quality. But we will, as you say, work with you.

Senator DIXON. Yes. I was going to ask you if you would work with staff. I have no intention of trying to dominate one theme over another.

I want to announce for the benefit of my colleague and everybody in the room, there will be a vote in about 10 minutes on that amendment I spoke against earlier. I think if the Senator is going to be here that long, maybe one of us could go first and come back; or something like that, and maybe we will have to not interrupt this hearing.

We are down to the last panel. I want to thank you, Ms. Harrison and Mr. Bedell. We can start the next panel I think, and we'll just see how it goes. Ten minutes in the Senate can sometimes be sort of an eternity. [Laughter.]

One never knows.

We thank you both for very valuable contributions. We appreciate it.

I'm going to put the statement of my distinguished friend from Connecticut, Senator Weicker, in the record at this point in time, supporting the amendment under discussion here. We fought this morning on the Floor, but we are as one on this question.

[The prepared statement of Senator Weicker follows:]

**OPENING STATEMENT OF SENATOR LOWELL WEICKER, JR.**
**BEFORE SMALL BUSINESS COMMITTEE HEARING ON AMENDMENT TO S. 1559**
**APRIL 14, 1988**

MR. CHAIRMAN, I WANT TO COMMEND SENATOR DIXON FOR HOLDING THIS HEARING ON THIS PROPOSAL TO REPEAL SECTION 921(H) OF THE DEPARTMENT OF DEFENSE AUTHORIZATION ACT OF 1987 THAT WOULD SEVERLY REDUCE SIZE STANDARDS IN CERTAIN INDUSTRIES. IN ITS PLACE, WE ARE PROPOSING A PILOT PROGRAM THAT ADDRESSES THE CONCERNS WHICH CAUSED THIS PROVISION TO BE ENACTED, WITHOUT SERIOUSLY UNDERMINING THE STANDARDS DETERMINING SMALL BUSINESS ELIGIBILITY FOR A WIDE RANGE OF ASSISTANCE PROGRAMS.

THE LEGISLATIVE HISTORY OF THIS PROVISION IS A LONG AND TORTUROUS ONE. HOWEVER, TWO ESSENTIAL POINTS I WOULD LIKE TO MAKE. FIRST, NO HEARINGS WERE HELD ON THIS PROVISION BY THE HOUSE OR SENATE COMMITTEES OF JURISDICTION PRIOR TO ENACTMENT. SECOND, THIS HOUSE-INITIATED PROVISION WHICH AMENDS THE SMALL BUSINESS ACT WAS AGREED TO IN CONFERENCE <u>WITHOUT</u> THE SENATE COMMITTEE ON SMALL BUSINESS AS CONFEREES.

AS A RESULT OF THIS EFFORT TO "SHORT-CIRCUIT" THE LEGISLATIVE PROCESS TO ADDRESS A COMPLEX PROCUREMENT PROBLEM, WE ARE CONFRONTED WITH A CRISIS SITUATION THAT MUST BE ADDRESSED BY JUNE 1. SPECIFICALLY, SECTION 921(H) HAS RESULTED IN SBA PROPOSING CATASTROPHIC REDUCTION IN SIZE STANDARDS FOR CONSTRUCTION. THE CONTINUING RESOLUTION FOR FY '88 INCLUDED LANGUAGE THAT POSTPONES

ANY EFFECTIVE DATE FOR SECTION 921(H) UNTIL MAY 31, 1988. THUS, AS OF JUNE 1, SBA WOULD BE ABLE TO REDUCE SIZE STANDARDS FOR CONSTRUCTION BY AS MUCH AS 80 PERCENT FOR CERTAIN CLASSES OF CONSTRUCTION. I ASK UNANIMOUS CONSENT THAT A CHART DEMONSTRATING THE SITUATION WE ARE CONFRONTED WITH BE PRINTED IN THE RECORD:

PROPOSED SMALL BUSINESS SIZE STANDARDS
FOR FEDERAL PROGRAMS

| Standard Industrial Classification | Industry Description | Current Size Standard | Proposed Size Standard |
|---|---|---|---|
| 1711 | Plumbing, Heating, and Air Conditioning | $ 7.0M | $1.25M |
| 1721 | Painting, Paper Hanging and Decorating | $ 7.0M | $ .50M |
| 1731 | Electrical Work | $ 7.0M | $1.50M |
| 1741 | Masonry and Other Stonework | $ 7.0M | $1.50M |
| 1742 | Plastering, Drywall and Insulation | $ 7.0M | $ .25M |
| 1743 | Terrazo, Tile, Marble, and Mosaic Work | $ 7.0M | $1.25M |
| 1751 | Carpentering | $ 7.0M | $ .75M |
| 1752 | Floor Laying and Floor Work, N.E.C.* | $ 7.0M | $ .75M |
| 1761 | Roofing and Sheet Metal Work | $ 7.0M | $1.00M |
| 1771 | Concrete Work | $ 7.0M | $ .50M |
| 1781 | Water Well Drilling | $ 7.0M | $ .75M |
| 1791 | Structural Steel Erection | $ 7.0M | $4.50M |
| 1793 | Glass and Glazing Work | $ 7.0M | $1.00M |
| 1794 | Excavating and Foundation Work | $ 7.0M | $ .50M |
| 1795 | Wrecking and Demolition Work | $ 7.0M | $3.75M |
| 1796 | Installing Building Equipment, N.E.C.* | $ 7.0M | $2.75M |
| 1799 | Special Trade Contractor, N.E.C.* | $ 7.0M | $2.50M |
| 1521 | Single Family Housing Construction | $17.0M | $2.00M |
| 1522 | Residential Construction, N.E.C.* | $17.0M | $9.75M |
| 1531 | Operative Builders | $17.0M | $1.25M |
| 1541 | Industrial Builders and Warehouses | $17.0M | $5.25M |
| 1542 | Nonresidential Construction, N.E.C.* | $17.0M | $3.50M |
| 1611 | Highway and Street Construction | $17.0M | $4.00M |
| 1622 | Bridge, Tunnel and Elevated Highway Construction | $17.0M | $1.75M |
| 1623 | Water, Sewer, and Utility Line Construction | $17.0M | $1.25M |

*N.E.C. = Not Elsewhere Classified
M = Millions of Dollars

MR. CHAIRMAN, I AM TOTALLY SYMPATHETIC WITH THE CONCERNS OF SEVERAL INDUSTRIES WHO BELIEVE THAT SMALL BUSINESS PARTICIPATION IN FEDERAL PROCUREMENT IS UNEVENLY DISTRIBUTED. THE SMALL BUSINESS ACT REQUIRES THAT A "FAIR PROPORTION" OF CONTRACTS BE AWARDED TO SMALL BUSINESS. AGENCIES ALL TOO OFTEN MEET THEIR AGGREGATE SMALL BUSINESS GOALS BY SETTING-ASIDE A HIGH PERCENTAGE OF CONTRACTS FOR ONLY SMALL BUSINESSES IN CERTAIN INDUSTRIES. FOR SEVERAL YEARS, ARCHITECTURAL AND ENGINEERING, CONSTRUCTION AND WASTE REMOVAL HAVE COMPLAINED TO THE CONGRESS THAT PROCURING AGENCIES ARE EXCESSIVELY RELYING ON THEIR INDUSTRIES TO MEET OVERALL SMALL BUSINESS GOALS.

IN ORDER TO ACHIEVE THE GOAL OF "FAIR PROPORTION", SECTION 921(H) WOULD REQUIRE THE REDUCTION OF SIZE STANDARDS FOR INDUSTRY CATEGORIES: CONSTRUCTION; INDUSTRY DREDGING; ARCHITECTURAL AND ENGINEERING SERVICES; (INDUSTRY SURVEY AND MAPPING); SHIP BUILDING AND SHIP REPAIR; AND REFUSE SYSTEMS. SBA WAS REQUIRED TO REDUCE SIZE STANDARDS SO THAT NO MORE THAN 30 PERCENT OF TOTAL CONTRACTS WOULD BE SET-ASIDE, THUS REQUIRING 70 PERCENT OF THE CONTRACTS TO BE AVAILABLE FOR UNRESTRICTED COMPETITION.

THE RESULT OF THIS PROVISION IS THAT CONSTRUCTION SIZE STANDARDS WERE REDUCED BY 80 PERCENT ON AVERAGE AND THE OTHER INDUSTRIES MENTIONED ABOVE RECEIVED LITTLE OR NO RELIEF. THUS, THE QUESTION OF EXCESSIVE SET-ASIDES REMAINS UNRESOLVED. MEANWHILE, CONSTRUCTION FIRMS, WITH NO INTEREST IN FEDERAL

PROCUREMENT, ARE BEING DENIED ACCESS. IN SUMMARY, TINKERING WITH SIZE STANDARDS IS AN ILL-ADVISED POLICY AND MUST BE REPEALED.

AS AN ALTERNATIVE TO SECTION 921(H) WE ARE OFFERING A SMALL BUSINESS COMPETITIVE DEMONSTRATION PROGRAM FOR THE INDUSTRIES SPECIFIED IN THAT PROVISION. UNDER THIS PILOT PROGRAM, CONTRACTS WOULD BE AWARDED ON THE BASIS OF FULL AND OPEN COMPETITION. SMALL BUSINESS PARTICIPATION RATE WOULD BE CLOSELY MONITORED. EVERY SIX MONTHS, EACH PROCURING AGENCY WOULD BE REQUIRED TO ACCESS THE FEDERAL PROCUREMENT DATA SYSTEM TO DETERMINE WHETHER SMALL BUSINESS ACTIVITY IS AT A MINIMUN THRESHOLD. SINCE THERE IS A THREE MONTH LAG IN DATA INPUT, THE AGENCIES WOULD BE RELYING ON THE FIRST THREE MONTHS OF THAT TIME PERIOD IN MAKING THE DETERMINATION. IF SMALL BUSINESS INVOLVEMENT FALLS BELOW A SPECIFIED THRESHOLD LEVEL, EACH PROCURING AGENCY WOULD BE AUTHORIZED TO UTILIZE SET-ASIDES IN ORDER TO INCREASE SMALL BUSINESS PARTICIPATION WITHIN CERTAIN INDUSTRIES. THE THRESHOLD LEVEL, OR TRIGGER, WOULD BE TWICE THE GOVERNMENT-WIDE SMALL BUSINESS PERCENTAGE FOR THE PREVIOUS FISCAL YEAR. IN FISCAL YEAR 1987, SMALL BUSINESS RATE WAS 15 PERCENT, THUS 30 PERCENT WOULD BE THE MINIMUM GOAL FOR FISCAL YEAR 1988.

THIS PILOT PROGRAM WOULD BE CONDUCTED FOR A THREE-YEAR PERIOD. THE OFFICE OF FEDERAL PROCUREMENT POLICY WOULD BE REQUIRED TO REPORT TO THE CONGRESS AS TO HOW SMALL BUSINESSES FAIRED.

MR. CHAIRMAN, THE INDUSTRIES DESIGNATED IN THIS AMENDMENT ARE HIGHLY COMPETITIVE AND SMALL BUSINESS DOMINATED. WE BELIEVE THAT SMALL BUSINESS WILL CONTINUE TO DO VERY WELL UNDER THIS DEMONSTRATION PROGRAM IN OBTAINING FEDERAL CONTRACTS EVEN WITHOUT THE USE OF SET-ASIDES. IF WE ARE PROVED WRONG, THEN THE SET-ASIDE TOOL COULD BE KICKED IN AFTER A SIX-MONTH PERIOD.

IT IS IMPORTANT TO NOTE THAT THE SECTION 8(A) AND DEPARTMENT OF DEFENSE SECTION 1207 SMALL AND DISADVANTAGED BUSINESS PROGRAMS ARE UNAFFECTED BY THIS AMENDMENT. GIVEN THE IMPORTANCE OF INCREASING THE AMOUNT OF MINORITY PARTICIPATION IN FEDERAL PROCUREMENT, THE AMENDMENT DOES NOT ALTER THE USE OF THESE IMPORTANT PROCUREMENT PROGRAMS. TODAY, MINORITY BUSINESS RECEIVE ONLY 2.9 PERCENT OF ALL FEDERAL CONTRACTS. S. 1993, THE 8(A) REFORM BILL PENDING BEFORE OUR COMMITTEE SEEKS TO RAISE THAT GOAL TO 5 PERCENT. NOTHING IN THIS PROPOSAL WE ARE OFFERING TODAY WOULD UNDERMINE THIS EFFORT TO IMPROVE MINORITY BUSINESS ACCESS TO FEDERAL MARKETS.

MR. CHAIRMAN, NO ONE SHOULD CONSTRUE THIS AMENDMENT AS AN EFFORT TO UNDERMINE SMALL BUSINESS SET-ASSIDES. DURING ANY TIME ON THE SMALL BUSINESS COMMITTEE, I HAVE CONSISTENTLY FOUGHT TO IMPROVE SMALL BUSINESS PARTICIPATION IN FEDERAL PROCUREMENT BY REDUCING OBSTACLES TO COMPETITION. SET-ASIDES IS AN IMPORTANT REMEDIAL TOOL THAT SHOULD BE AGGRESSIVELY USED, WHEN SMALL BUSINESSES IN CERTAIN SECTORS ARE BEING DENIED REAL OPPORTUNITIES TO BID ON FEDERAL CONTRACTS.

Senator DIXON. Mr. Lester H. Smith, Jr. of Smith, Seckman and Reid in Nashville, representing the Committee on the Federal Procurement of Architectural/Engineering Services, who may want to comment, incidentally, on that last discussion we just had; and John Bishop, the president of Gurnee Heating and Air Conditioning in Closter, NJ, representing the Associated Builders and Contractors. We are delighted to have you both.

Do you have any preference about who goes first? Mr. Smith, you are listed as first. Why don't you proceed?

Mr. SMITH. I'll proceed.

Senator DIXON. If you could be as nice as the previous panels on restricting your remarks, brevity is valuable, we would all appreciate it.

Mr. SMITH. Certainly, Mr. Chairman. We'll be happy to do that.

Senator DIXON. The full text of your remarks, which I have and the Senator from Missouri has, will be reproduced in the record in full.

Mr. SMITH. We appreciate that very much.

**STATEMENT OF LESTER H. SMITH, JR., SMITH, SECKMAN & REID, INC., NASHVILLE, TN, REPRESENTING THE COMMITTEE ON THE FEDERAL PROCUREMENT OF ARCHITECTURAL/ENGINEERING SERVICES, WASHINGTON, DC**

Mr. SMITH. I am Lester Smith from Nashville, TN. I am a consulting engineer in Nashville. I'm currently the president of the American Consulting Engineers Council and this morning I represent the Committee on Federal Procurement of Architectural/Engineering Services [COFPAES], which itself represents the major architectural/engineering surveying and mapping professional societies. And the purpose of our committee is to promote sound Federal procurement practices for A/E services. We appreciate this opportunity to present our views on small business procurement issues of concern to the design profession.

The professions have encountered some problems in the procurement area. One difficulty involves the SBA size standards whereby the overwhelming majority of A/E firms are currently classified as small business. Another concerns the application of the set-aside rules which has the effect of setting aside most A/E contracts exclusively for small business.

When small business set-asides are used for the award of a preponderance of the contracts in that industry category, the following undesirable conditions can materialize. Small businesses—that is, those below the SBA standard—have a disincentive to achieve economies of scale or to make the capital investment needed to grow and modernize. In such a situation, a decision to grow past the size standard is, in effect, a decision to abandon the Federal market since there are relatively few contracts open to unrestricted competition.

Additionally, businesses above the size standard are precluded from the Federal market regardless of competitiveness or technical capability.

The truly small businesses, as well as new market entrants, are not afforded the benefits of set-aside since the larger small businesses can dominate the set-aside market.

By maintaining artificially high standards and set-aside levels in a few industries, the agencies use these industries, such as the A/E industry, to achieve virtually all of their small business participation goals. Consequently, other industry groups lag well behind in opportunities for small businesses to participate.

Congress has been quite receptive to both the size standard and set-aside issues as they affect our professions. A provision was enacted that would change the existing law which permitted a virtual total set-aside of all contracts in a particular category to a process whereby every industry category would be entitled to receive a fair share of Federal contracts. Under this new provision, 30 percent of the value of contracts would be earmarked for small business A/E's. However, all firms large and small would be entitled to compete for the remaining 70 percent of Federal A/E contracts.

While section 921 has served a critical role in focusing attention on these problems, the implementation of the act with this section particularly may present some implementation difficulties that hinder the ability to resolve the problems that it is intended to resolve.

For that reason, the A/E industry, including COFPAES and other groups like the Design Professionals Coalition and the Management Association for Private Photogrammetric Surveyors have supported the adoption of a small business Test Pilot Program as envisioned by S. 1559. We fully support the Test Pilot Program intent and hope that it will go forward. We have received a draft of the proposed legislation and detailed comments will be provided.

Just a couple of comments on specific areas. Section 102(a) could be greatly clarified and more readily implemented by Federal agencies if a set-aside goal was established such as 30 percent. This would have the beneficial impact of creating a more valid test for the 3 years; presents a clear goal for each year in the test; and provides a substantially higher level than is generally attained in government-wide small business participation.

Mr. Chairman, the architectural, engineering, surveying, and mapping professions represented by COFPAES are gratified by and support your concept of conducting a Pilot Small Business Competitiveness Demonstration Program. In our opinion this program will demonstrate that small business A/E firms will receive a fair proportion of Government contracts under open competition.

We thank you very much.

[The prepared statement of Mr. Smith follows:]

**COFPAES**
**COMMITTEE ON FEDERAL PROCUREMENT OF ARCHITECTURAL/ENGINEERING SERVICES**

American Congress on Surveying & Mapping
American Consulting Engineers Council
American Institute of Architects
American Society of Civil Engineers
ARTBA Planning & Design Division
National Society of Professional Engineers

STATEMENT

By

COMMITTEE ON FEDERAL PROCUREMENT
OF ARCHITECTURAL/ENGINEERING SERVICES

To

SENATE COMMITTEE ON SMALL BUSINESS

Concerning

SMALL BUSINESS PROCUREMENT ISSUES AFFECTING
THE ARCHITECTURAL, ENGINEERING AND SURVEYING PROFESSIONS

April 14, 1988

## SUMMARY OF STATEMENT

Architects, engineers, surveyors and mappers (A/Es) have experienced problems in government contracting due to -

(1) unreasonable small business size standards where practically all A/E firms are designated "small" and

(2) Rule of Two which results in virtually all A/E contracts being set aside.

The A/E community continues to support Sec. 921 (P.L. 99-661) reforms including SBA review of A/E size standards.

DOD A/E contracting data shows data that small business A/Es receive 81% of contract actions and 65% of contract dollars under open competition.

Use of set asides and special incentives are not necessary to assure that small business A/Es receive a fair proportion of government contracts.

The A/E professions support a pilot "Small Business Competitiveness Demonstration Program" whereby A/E contracts will be awarded under full and open competition for a three-year period.

INTRODUCTION

Mr. Chairman, my name is Lester H. Smith, Jr. I am a licensed, professional engineer from Nashville, Tennessee and a delegate of the Committee on Federal Procurement of Architectural/Engineering Services (COFPAES). COFPAES represents the following major architectural, engineering and surveying (A/E) professional societies:

American Congress on Surveying and Mapping
American Consulting Engineers Council
American Institute of Architects
American Society of Civil Engineers
ARTBA Planning and Design Division
National Society of Professional Engineers.

The vast majority of America's practicing architects, engineers and surveyors belong to these societies. The purpose of our Committee is to promote sound Federal procurement practices for A/E services. As you may know, the Federal government is a major client of the A/E professions. We appreciate this opportunity to present our views on small business procurement issues of concern to the design professions.

When the Federal government requires A/E services it utilizes a procedure whereby: the opportunity is publicly announced so that all firms can compete if they choose to do so; interested firms submit their qualifications to the agency; thereafter, the most qualified firm is selected subject to the negotiation of a fee that is fair and reasonable to the government. This process is embodied in the so-called Brooks Act, P.L. 92-582, enacted in October 1972. The law has worked well and is supported by the A/E professions and the Federal construction agencies. Indeed, Congress underscored the viability of the Brooks procedure by recognizing the process as fully competitive within the parameters of the recently enacted Competition in Contracting Act (P.L. 98-369).

DISCUSSION

The A/E professions have encountered some problems in the procurement area. One difficulty involves SBA size standards whereby the overwhelming majority of A/E firms are currently classified as small business. Another concerns the application of the set-aside rules, which has the effect of setting aside most A/E contracts exclusively for small business.

When small business set-asides are used for the award of a preponderance of contracts in an industry category, the following undesirable conditions can materialize:

(1) Small businesses (those below the SBA size standard) have a disincentive to achieve economies of scale, or to make the capital investment needed to grow and modernize plant and equipment to be competitive outside of the preference market. In such a situation, a decision to grow past the size standard is, in effect, a decision to abandon the Federal market since there are relatively few contracts open to unrestricted competition;

(2) Businesses above the size standard are precluded from the Federal market regardless of competitiveness or technical capability;

(3) The "truly" small businesses, as well as new market entrants, are not afforded the benefits of set-asides since the "larger" small businesses can dominate the set-aside market;

(4) Small businesses in such markets have an incentive to "game" size standards by spinning off affiliated firms and other "fronts" in order to stay within the set-aside market; and

(5) By maintaining artifically high size standard and set-aside levels in a few industries, agencies

use these industries (such as the architectural, engineering and surveying (A/E) industry) to award virtually all of their small business participation goals. Consequently, other industry groups lag well behind in opportunities for small businesses to participate.

We discussed these issues in considerable detail at your September 1987 hearing.

Congress has been quite receptive to both the size standard and set-aside issues as they impact the A/E professions. A provision (Section 921, Title IX of the Defense Acquisition Improvement Act of 1986, P.L. 99-661) was enacted that would change then existing law, which permitted a virtual total set-aside of all contracts in a particular industry category, to a process whereby every industry category would be entitled to receive a fair share of Federal contracts. Under this new provision, 30 percent of the value of contracts would be earmarked for small business A/Es. However, all firms - large and small - would be entitled to compete for the remaining 70 percent of Federal A/E contracts. We think this is in the spirit of various laws designed to assist small business.

While Section 921 has served a critical role in focusing attention on the problems encountered by the A/E industry with

the administration and implementation of the Small Business Act, the Section itself presents enactment problems that hinder its ability to resolve the problems discussed.

For that reason the A/E industry, including COFPAES and other groups such as the Design Professionals Coalition, the Management Association for Private Photogrammetric Surveyors (MAPPS) and the Western Federation of Professional Surveyors, have been supporting the adoption of a small business test/pilot program as encompassed by S. 1559. We fully support the test/pilot program's intent to determine the potential for small business participation through unrestricted competition in limited categories of Federal procurement, such as A/E contracts.

Recently, we received a draft of the proposed S. 1559 legislation. While we shall provide detailed comments to your staff on the provisions of the bill, I want to focus on one area we believe would strengthen the legislation:

- Section 102(a) could be greatly clarified and more readily implemented by the Federal agencies if a set goal was established, such as 30 percent. This would have the beneficial impact of:

  (a) creating a more valid test for three (3) years of the program;

(b) presenting a clear goal for each year in the test; and

(c) provide a substantially higher level than is generally attained in government-wide small business participation.

In addition to the provisions discussed, the draft bill also contains a vitally important section to the A/E community. Title III of the bill is a technical amendment to Section 901 of the Federal Property and Administrative Services Act (40 U.S.C. 541), which attempts to clearly define the meaning of architectural/engineering services.

The definition language closes a loophole by which professional A/E services are being procured outside the mandates established by P.L. 92-582 (commonly referred to as the "Brooks A/E Law"). The Brooks A/E Law requires that A/E services be procured through a qualifications-based selection method, followed by contract negotiations to determine a "fair and reasonable" fee.

A similar definition provision has been included in the House of Representatives' OFPP reauthorization bill (H.R. 3345). If the Committee, in its wisdom, wishes to move S. 1559 with Title III -- or suggests including the Title in the Senate's OFPP reauthorization bill -- we will vigorously support its decision.

CONCLUSION

Because SBA is unwilling to adjust the A/E size standard to a more realistic level, for example, so that 30% of Federal A/E contract dollars are earmarked for firms classified as small business as called for by Section 921 -- we suggested at your last hearing that this Committee consider other ways of assuring that a fair proportion of government contracts are awarded to small business A/E firms. For this reason, Mr. Chairman, the architectural, enginering, surveying and mapping professions represented by COFPAES are gratified by and support your concept of conducting a pilot "Small Business Competitiveness Demonstration Program." In our opinion, this Program will demonstrate that small business A/E firms will receive a fair proportion of government contracts under open competition.

We wish to thank you, Mr. Chairman, and the other cosponsors, Senator Weicker and Senator Bumpers, for being responsive to the concerns we raised at last year's hearing.

Senator DIXON. We thank you, Mr. Smith. And we'd appreciate it if you will work with staff.

Mr. Bishop, we are delighted to have you here.

**STATEMENT OF JOHN BISHOP, PRESIDENT, GURNEE HEATING AND AIR CONDITIONING, INC., CLOSTER, NJ, REPRESENTING THE ASSOCIATED BUILDERS AND CONTRACTORS, INC.**

Mr. BISHOP. Thank you, Mr. Chairman.

I am a small contractor from northern New Jersey, and I'm here representing ABC as its national legislative chairman. And we appreciate the opportunity to be here and testify today.

Like others, we oppose set-asides as a matter of principle, believing that they do not contribute to the overall objectives of Government. But we did support section 921 originally as a means of ensuring access of a number of small businesses throughout the range of supplies and services the Government buys and not to be limited to just construction.

As we have heard before—and I won't give you the whole bale of hay again—section 921 isn't going to work. So, that's in our written remarks, and you have heard all that this morning. So, you don't need to hear it again.

But we do endorse the objective that——

Senator DIXON. I appreciate that comment. When I was a young legislator, a freshman Member of the House in 1951 back in Illinois, I was making a speech. Everybody was hollering vote, vote but I wanted to keep on talking. A fellow said "They're going to vote for your bill so be smart: sit down and shut up." [Laughter.]

I learned that early on.

Mr. BISHOP. Thank you very much.

But we do endorse the objectives that were set forth there and which the Committee is recognizing of trying to spread the small business contribution not to be just concentrated in certain selected industries, but throughout the Government procurement process.

And in that light, we applaud your willingness as set forth in your amendment to considerable workable alternatives. And we endorse the concept of the Pilot Program that you have started. We believe it will achieve the fair proportion doctrine by diffusing the automatic set-aside mechanism for industries which are already dominated by small businesses, such as engineering as you've heard, and construction as you've heard.

Also, we believe, as you've also heard, that in many of these industries the firms are fully well able and capable of competing on their own without assistance in the form of a set-aside program. However, we have seven specific points we would like to make and they are again set forth in more detail in the written remarks.

First, in the event that a Pilot is not instituted by May 31, as you have heard before, the SBA should be prohibited from instituting this further delineation of the size standards into some 27 categories which would be very unworkable in our opinion and cause great troubles.

We also have reservations regarding the method that is set forth to determine small business participation goals. We prefer a more specific reference, such as in section 921. For example, if the 30

percent were achieved under your program—heaven forbid it should be achieved—would 60 percent goal be the goal for the following year, taking the 200 percent? If not, it should be clarified so that is not the intention of the Pilot.

We support your requirement for quarterly monitoring, but we would be hesitant to see that result in changed goals every quarter. We're in a seasonal business. You could very well have one quarter where you would have one condition and another quarter where you would have another. We think that the annual measurement in terms of changing the goals for succeeding periods would be more appropriate.

We do object to leaving section 8(a) and section 1207(a) set-asides out of the program. We think the program would be better to include all of these programs. And we think you would be very surprised and gratified of the results that would occur in that case.

We also encourage you to include subcontracting activity and suppliers because those are also very important measures of small business participation in the overall Government Process.

Concerning definitions, we ask the Committee to clearly state that the Pilot addresses awards made in the aggregate to each industry, not individual little pieces.

And lastly, we ask you to establish that the Pilot Program will become permanent if it is successful.

We thank you for the opportunity to testify.

[The prepared statement of Mr. Bishop follows:]

TESTIMONY

OF

JOHN BISHOP

GURNEE HEATING AND AIR-CONDITIONING

ON BEHALF OF

THE ASSOCIATED BUILDERS AND CONTRACTORS, INC.

REGARDING

SECTION 921 OF PUBLIC LAW 99-661

AND PROPOSED ALTERNATIVES

BEFORE THE

COMMITTEE ON SMALL BUSINESS

UNITED STATES SENATE

APRIL 14, 1988

729 15th Street, NW • Washington, DC 20005 • (202) 637-8800

Mr. Chairman, Members of the Committee,

My name is John Bishop. I am President of Gurnee Heating and Air-Conditioning in Closter, New Jersey. I am here today representing the Associated Builders and Contractors (ABC) in my capacity as Chairman of the ABC Legislative Committee. I sincerely appreciate the opportunity today to comment on implementation by the U.S. Small Business Administration of Section 921 of the 1987 Defense Authorization Act (PL 99-661), and the alternative proposed by the committee.

ABC is a national construction industry trade association representing 20,000 general contractors, subcontractors, and related industry suppliers. ABC members adhere to the Merit Shop Construction philosophy which holds that construction contracts should be awarded in fair and open competition to the lowest, responsible bidder.

Representing all facets of the industry-from large general contractors to small subcontractors and suppliers-ABC is truly in a unique position to comment on small business set aside issues.

Consistent with ABC's overall philosophy, our members, both large and small, traditionally view federal contracts awarded by any criteria other than the lowest responsible bid as inconsistent with government's responsibility to

taxpayers to obtain the lowest cost possible in the federal procurement process.

Though ABC has long opposed set-asides, we recognize that this procurement method is likely to remain part of the federal contracting process. ABC also recognizes that many members of this committee are firmly committed to the view that set-asides foster small business participation in federal procurement.

In that context, ABC supported enactment of Section 921 of PL 99-661 as a means of ensuring access for small businesses of all industries, not just construction, to a fair proportion of set-aside contracts by industry and by federal agency.

Under current federal procurement practices, however, such is not the case. According to SBA, small business set-aside programs restricted open competition on more than 64 percent of federal construction contracts in Fiscal Years 1984-1986. In certain trades, the percentage of contracts set-aside ranged as high as 91.7 percent.

ABC believes that too many construction contracts are set-aside by federal agency contracting officers because of the nature of our particular industry. Construction is clearly a small business dominated industry. Because our industry is labor intensive, provides relatively simple entry for individual

entrepreneurs, and requires relatively small financial resources, small construction firms are continually forming in all areas of the nation. Hence, current Small Business Administration size standards classify the majority of construction contractors as small businesses--even those that seem large compared with their peers.

In concert with the widely used "Rule-of-Two" (FAR 19.502.2), the high proportion of small businesses competing in the construction marketplace almost always allows contracting officers to set-aside many federal construction contracts. Because there are so many small entrepreneurs in construction, agency procurement officers can always reasonably assume that two or more small businesses might bid on most federal construction contracts. Therefore, as authorized by the Rule-of-Two which allows a contract to be set-aside if two or more small businesses can be expected to bid, agencies can restrict competition on many construction contracts. Hence, the use of the Rule-of-Two will naturally result in excessive set-asides in industries already dominated by small firms.

Section 921 was enacted to limit the number of contracts set-aside for small businesses to 30 percent of the dollar volume of federal procurement in four specific industries where small businesses predominate, and to distribute a fair proportion of federal set-asides to industries where small businesses do not receive a significant share of federal contracts.

(4)

Instead of modifying the Rule-of-Two as it applies to industries dominated by small business, Section 921 sought to reduce the number of firms contracting officers using the Rule-of-Two would consider small businesses for purposes of federal procurement. Specifically, Section 921 directed SBA to review the size standards actually used to define a small business in these industries for federal contracting purposes.

The goal of Section 921 was to limit the number of construction contracts set-aside each year to the 30 percent level and to force federal contracting officers to make a greater effort to identify potential small business bidders in other industry categories.

Since its enactment in the 99th Congress, and despite subsequent changes and clarifications pursued in the 100th Congress, it remains evident that further alterations are necessary to effectively implement Section 921 and achieve a truly fair proportion of small business set-asides, and small business participation in all industries.

Before discussing ABC's views regarding the shortcomings of the 921 implementation process, let me emphasize ABC's continuing support for Section 921's goals and objectives. Its passage represented an acknowledgment by Congress that federal contract set-asides were intended as <u>tools</u> to help small businesses compete for federal contracts and achieve some measure of financial

viability in the process. Congress recognized that set-asides in themselves do not quantify small business participation.

ABC believes that the fair proportion standard advocated in Section 921 will actually result in greater small business participation in federal procurement. This will result because agencies will make a greater effort to set-aside contracts in industries where small businesses have trouble competing, while small construction contractors will continuing performing federal construction contracts but will win them in open competition.

For example, the proliferation and survival of so many small firms in the highly competitive construction marketplace is strong evidence that small contractors can compete for, and win, government contracts, just as they do for private contracts every day without government protection.

Though we endorsed the objectives embodied in Section 921, ABC knew that merely adjusting size standards without considering the actual set-aside mechanism (Rule-of-Two) was an imperfect solution at best. Its implementation turned out even worst than expected. In fulfilling its congressional mandate to review current size standards for the four industries enumerated in Section 921, SBA recommended lower size standards for construction. However, SBA expanded the number of construction size classifications from two standards now to 27. SBA developed this proliferation of standards by separating data from

each four-digit Standard Industrial Code (SIC) applicable to construction ABC views SBA's interpretation of Section 921 in this regard as flawed because the agency was instructed to review size standards by industry category.

It is our view that Congress intended that SBA review the current size standards, and not use the review process to divide procurement data for the purpose of creating a menu of new standards. It is reasonable to expect that Congress was requesting analysis and modification of existing standards, otherwise SBA would have been expressly instructed to create new and more narrowly defined standards.

Traditionally, SBA has treated construction size standards from the perspective of two general divisions---$17 million in annual receipts for general contractors and $7 million for specialty contractors. The clear-cut differentiation left no doubt for either contracting officers or bidders as to the classification of a contract for set-aside purposes. The proliferation of standards, in our view, will result in administrative confusion regarding the award of contracts to types of construction companies with extremely small operating distinctions.

For example, a federal contract requiring decorative (non-structural) stonework could be awarded to a "Painting, Paper Hanging, and Decorating Contractor" ($.50 million size standard) or a "Masonry and Stonework

Contractor" ($1.50 million size standard). A contracting officer would have considerable discretion in the classification of a contract and might lead to contract "shopping" among the various construction standards.

ABC strongly opposes this major expansion of standards. They were unintended by Congress and will ultimately result in considerable confusion and unfairness in the federal procurement process.

In that light, ABC applauds the committee's willingness to consider alternatives which further the principle of fair proportion as enunciated in Section 921, but involve less administrative confusion and focus more directly on the root of the problem--excessive set asides.

ABC endorses the concept of a pilot proposal along the lines of that proposed by committee. Generally, we support a defined small business participation goal for the construction industry which reflects a fair proportion of small business contract awards. We also advocate use of a definition of small business participation which includes contracts let in open competition as well as set-asides. The program should require unrestricted competition for federal procurement once agencies achieve the industry small business participation goal. If such goal is not achieved, agencies should be allowed to use "remedial" tools like set-asides to meet it.

ABC is confident that if structured properly, a pilot program of this nature will demonstrate the considerable competitive capabilities of construction contractors by proving once and for all that small firms can win construction contracts in open competition. It will also encourage federal agencies to make a better effort in finding small business bidders in industries with low proportions of small business participation.

The pilot program builds effectively on the concept of fair proportion by defusing the automatic set-aside mechanism in industries where small businesses now dominate. It recognizes that open and unrestricted competition is the preferred method of winning federal contracts for small construction contractors. By factoring in the number of contracts won by small business in open competition into overall measures of small business participation, the pilot will rectify the common perception that number of small business contracts set-aside are the only quantifier of overall small business participation. In fact, nothing in the pilot would preclude small construction contractors from winning 100 percent of federal construction contracts.

Though ABC strongly approves of the concept you are considering, I would like to comment on several specific provisions of your proposal.

First, ABC urges the committee to prohibit SBA from implementing suggested construction small business size standard changes it proposed during implementation of Section 921. As you know, SBA can move forward with a final

rule after the Congressionally mandated moratorium expires on May 31, 1988. ABC feels implementation of the burdensome changes proposed by SBA would be ill-advised in light of Congressional action on an alternative like that proposed by the committee. However, SBA could conceivably move forward with a final rule in the period between May 31 and January 1, 1989 when the pilot program would go into effect.

Second, ABC has reservations regarding the method you proposed to determine small business participation goals. We would prefer a more specific reference, reflecting the fair proportion standard in Section 921. As you know, Section 921 adopted 30 percent of total dollar volume as a fair proportion. In your proposal, you determine the small business participation goal as two hundred percent of overall small business participation in the prior fiscal year, rounded to the next higher whole number. Though in the first year of the program, your proposed calculation will result in roughly a 30 percent goal for construction, ABC is uncertain about the impact in the outyears of the program as overall small business participation in government procurement increases as a result of the pilot. In addition, we predict it will be relatively less difficult to assess the impact of the program if the participation goal, the trigger of open competition, remains stable throughout the duration of the pilot.

ABC supports Section 102(b) which requires that agencies monitor attainment of industry small business participation goals on a quarterly basis. However,

ABC urges the committee to make a clear distinction that monitoring is to be undertaken quarterly but final determination whether an agency achieved its small business participation goal is to be conducted annually.

ABC strongly objects that Section 8(a) and Section 1207 set-asides are excluded from full and open competition triggered in the program by excessive set-asides. In our view, such an exclusion is inappropriate in a test program designed to assess the impact of procurement through unrestricted competition.

In fact, the advantage of making the program a three year test allows the committee the opportunity to accurately assess the impact of the program on small businesses in the affected industries. The committee would then have the benefit of a "clean" test on which to base future set-aside policy.

With regard to Section 104 of the proposal referring to Subcontracting Activity, ABC urges the committee to ensure that whatever simplified reporting system is devised by the Administrator for Federal Procurement Policy includes suppliers for purposes of reporting subcontract awards in excess of $25,000. Further, ABC urges the committee to clearly include subcontractors in the calculation of small business participation.

Concerning Section 106(b) of your proposal which defines designated construction industry groups by product service code, ABC urges the committee

to clearly state that the program should reflect contract awards made in aggregate to the groups defined, so as not to encounter the administrative confusion like that created by SBA's proliferation of overly specific industry categories proposed in its implementation of Section 921 size standard changes.

Finally, ABC urges that the committee ensure that the pilot program becomes permanent if it effectively fulfills the committees goals and objectives.

In conclusion, let me let me express ABC's appreciation for your willingness to consider innovative alternatives to Section 921 which allow small business construction contractors to bid in full and open competition for government contracts and will expand procurement opportunities for small businesses in other industries. We support the concept you have proposed and look forward to working with you to see that it becomes law.

Thank you for this opportunity to discuss the construction industry, federal contract set-asides, and related issues. I would now be pleased to answer any questions the committee may have regarding these matters.

Senator DIXON. Mr. Bishop, you're an excellent witness. You have concluded your seventh point right at the bell. [Laughter.]

As the Senator from Illinois has predicted, we are not going to vote. That is the usual quorum call. [Laughter.]

Mr. BISHOP. Well, in that case I have some more remarks. [Laughter.]

Senator DIXON. Quit while you're ahead.

Mr. Smith, I just wanted to say to you that you heard the testimony of Mr. Bedell. I wondered if you would care to comment on the need for a clear definition of architectural and engineering services. Would you like to clarify the record from your perspective?

Mr. SMITH. Yes, Mr. Chairman. Title 3 is a technical amendment to section 901 of the Federal Property and Administrative Services Act. It is an attempt to close a loophole by which professional A/E services are being procured outside the mandates established by the Brooks law. That is P.L. 92-582. I realize there are several Brooks laws. [Laughter.]

Senator DIXON. He has been a busy man. [Laughter.]

Mr. SMITH. This is the Brooks A/E law.

Mr. Chairman, the other thing I would say is that this provision has been included in the OFPP reauthorization bill. We do not care whether it is there or in title 3. We do believe it is essential. And I would simply say that I am a small businessman, and I have never seen any industry any more competitive than my industry. And we believe that the services provided by our firms should be clearly understood and clearly defined for all procurement officers of the Federal Government.

Senator DIXON. Does my friend from Missouri have any questions of Mr. Smith and Mr. Bishop?

Senator BOND. I would just commend the Chairman on his astute observations about the working of this distinguished legislative body, having forecast that we wouldn't vote as predicted. I was reminded, Mr. Chairman, when you spoke of your legislative experiences, of when I first dealt with the Missouri General Assembly, one of the Members there established a test that I find to be good even until this day. He was not known as one of the more brilliant legislators. But one of his classic statements was, I know what the bill says, but what does it do. [Laughter.]

I think in this case we have two gentlemen who apparently support the objectives that were sought by section 921, but you are both, I gather, in agreement that it did not achieve the purposes. We appreciate your assistance in helping us to come to some means for dealing with the problem but without causing the apparent problems that the original enactment would cause.

I have no further questions.

Senator DIXON. I thank you very much, Senator Bond. And I am privileged to say that the Chairman of our Committee is here, the distinguished senior Senator from Arkansas, Senator Bumpers. I do want to comment that during the course of his chairmanship, he has been very, very accommodating to this Senator and others, in connection with all concerns regarding small business interests of the country. He has been a great champion of their cause. And we are grateful to him for his many accommodations. I might add that

both he and the Ranking Member of this Committee, Senator Weicker, are cosponsors of this legislation.

Mr. Chairman, I am delighted to tell you that of this extensive list of outstanding witnesses this morning, all expressed their support for what we are attempting to do in this legislation. They have indicated their concerns to us and have demonstrated the problems which we would face if the law remains in its present state. I'm sure you know that the present law is a consequence of what happened a couple of years ago on the DOD authorization bill, without hearings on the Senate side and after the House had rejected the idea in their own Small Business Committee. I'm privileged to have the Chairman here.

Mr. Chairman, we have concluded all of the testimony from all of the witnesses who have been very, very kind and accommodating. We are delighted to have you here, sir.

**STATEMENT OF HON. DALE BUMPERS, A U.S. SENATOR FROM THE STATE OF ARKANSAS**

The CHAIRMAN. Thank you very much, Senator Dixon. Thank you for Chairing these hearings this morning on a very important subject.

You hit a nerve when you pointed out that the Committee on the other side, which is not even a counterpart Committee, got us into this mess. And hopefully, we're going to be able to straighten it out. I recall that I asked Senator Goldwater and Senator Nunn to allow Senator Weicker and me to be a conferee on the DOD authorization bill that year, and we didn't even get a "we'll take it under advisement" response. And so, we will wind up taking this up on the Floor.

And with that, Mr. Chairman, let me say that I would like to enter a statement on this subject in the record.

Senator DIXON. It will be placed in the record.

[The prepared statements of Senators Bumpers, D'Amato, and Sasser follow:]

**Statement of Senator Dale Bumpers**
**Chairman, Committee on Small Business**
**April 14, 1988**

First, I want to express my debt of gratitude to Senator Alan Dixon, our Acting Chairman today, for the diligent work he has done on the issues before the Committee today over the last two years. As Chairman of our Small Business Subcommittee on Government Contracting and Paperwork Reduction, and as one of our two Committee members who also serve on the Armed Services Committee, Senator Dixon, has done his very best to protect this Committee's jurisdiction and to assure that these issues affecting size standards receive the careful and thorough consideration which they must. Today's hearing and the proposed amendment to S. 1559 are essential to assuring that the Small Business Committee is able to retain the jurisdiction granted under the Rules of the Senate, and also to ensuring that Congress does not clumsily trammel on the rights and interests of thousands of small businesses in efforts to address the problems of a few.

Today the Committee finds itself in the posture of attempting to correct problems created by members of the other body who are not even members of our counterpart committee. As everyone knows, Sec. 921 of the Defense Authorization Act for 1987, enacted in 1986, made a series of substantive amendments to the Small Business Act. These amendments were sponsored in the House Armed Services Committee by its chairman, with the support of the former chairman of the House Small Business Committee. They were never the subject of hearings in the House. They were never considered in the Senate, either in committee or on the floor.

There was never even legislation introduced in the Senate on this issue in the 99th Congress.

When Senator Weicker and I heard about these amendments, we wrote to Senator Goldwater and asked to be appointed as co-conferees for this portion of the Defense Bill so that we might at least examine the proposals. Our request was denied. Suffice it to say that I cannot recall an instance in Senate history in which one Committee's jurisdiction has been so patently usurped and abused, not by another Senate Committee but by another committee in the other body. Senators Dixon and Levin did their best to ameloriate the drastic effects of these changes in small business government contracting, but they were unable to address the crucial size standard issue.

This is not to say that I necessarily disagree with everything Chairman Aspin proposed. The limitations on subcontracting, for example, I heartily endorse. What I cannot abide, however, is the process which was used and the lack of consideration of the real impact which these changes could have on thousands of small businesses.

The complaint has been made that in certain industries, namely construction, architecture and engineering services and waste management, the small business set-aside, which limits bidders on federal contracts to small businesses only, where two or more small businesses are likely to offer competent bids, has dominated the markets to the exclusion of large businesses. The House Armed Services Committee came down on the side of large business and ordered SBA to reduce the size standards for four industries to a point at which no more than 30% per cent of contracts could be set aside. SBA, after incredibly complicated calculations, has told us what the new size standards will be, and the figures are interesting. In the construction industry, one of whose trade associations had agitated for this change, the

size standard will be reduced from $17 million to as low as $1.25 million in annual revenue. For non-residential construction, the new size standard would be $3.5 million. This is an earth-shaking change in an industry made up largely of small firms who will suddenly be unable to enjoy many benefits associated with being a small business. Many contractors in Arkansas have written to me expressing their displeasure over these changes, and I am sure that they were shocked when I told them that the changes were supported by their own trade association.

Not only will these firms with more than $3.5 million in annual revenue be ineligible for small business set-asides in federal contracting, they will be unable to participate in the SBA surety bond guaranty program; they will be unable to get an SBA guaranteed bank loan; they will be unable to go to a Small Business Development Center for assistance; they will be unable to participate in any state small business program which incorporates the federal small business definition, as many do. The impact on minority-owned small businesses would be especially harsh since so many of them are dependent on the SBA surety bonding program. About 50,000 construction firms will cease to be small businesses because of Sec. 921

Ironically, in the other affected industries there will be little change in the size standards, so the section does not achieve its intended effects of relieving the "too many set-asides" complaint. I ask that a chart showing the proposed changes in size standards for various types of contractors be included in the record at this point (attached). All of these ills show the dangers of committees legislating outside of their jurisdiction a nd without the benefit of public hearings.

The substitute amendment to S. 1559 being considered today may be called a radical approach by some, but I believe it offers the chance of addressing legitimate concerns of larger businesses,

while preserving the many non-set-aside benefits of the small business designation. If these industries are, in fact, dominated by small business, then the small firms should have little problem winning contracts in free and open competition. Hence, the amendment proposes a three-year test period in which we begin with free and open competition in the affected industries. We would, however, provide a semi-annual evaluation of federal contracting and, if the small business share of contracts falls below 30% in these industries, the set-aside will be reinstituted.

I look forward to the testimony of today's witnesses. I hope that the Committee can finalize Senator Dixon's bill soon, and I will consider adding this as an amendment to one of several other bills which are moving in the Committee and which I hope to mark up within the next month.

## PROPOSED SMALL BUSINESS SIZE STANDARDS FOR FEDERAL PROGRAMS

| Standard Industrial Classification | Industry Description | Current Size Standard | Proposed Size Standard | Percent Set-Aside and 8(a) Awards |
|---|---|---|---|---|
| 1711 | Plumbing, Heating, and Air-Conditioning | $ 7.0M | $1.25M | 69.9 |
| 1721 | Painting, Paper Hanging and Decorating | $ 7.0M | $ .50M | 69.6 |
| 1731 | Electrical Work | $ 7.0M | $1.50M | 62.5 |
| 1741 | Masonry and Other Stonework | $ 7.0M | $1.50M | 68.9 |
| 1742 | Plastering, Drywall and Insulation | $ 7.0M | $ .25M | 67.7 |
| 1743 | Terrazo, Tile, Marble, and Mosaic Work | $ 7.0M | $1.25M | 78.7 |
| 1751 | Carpentering | $ 7.0M | $ .75M | 91.1 |
| 1752 | Floor Laying and Floor Work, N.E.C.* | $ 7.0M | $ .75M | 88.2 |
| 1761 | Roofing and Sheet Metal Work | $ 7.0M | $1.00M | 89.3 |
| 1771 | Concrete Work | $ 7.0M | $ .50M | 91.5 |
| 1781 | Water Well Drilling | $ 7.0M | $ .75M | 55.4 |
| 1791 | Structural Steel Erection | $ 7.0M | $4.50M | 45.9 |
| 1793 | Glass and Glazing Work | $ 7.0M | $1.00M | 89.8 |
| 1794 | Excavating and Foundation Work | $ 7.0M | $ .50M | 84.4 |
| 1795 | Wrecking and Demolition Work | $ 7.0M | $3.75M | 79.8 |
| 1796 | Installing Building Equipment, N.E.C.* | $ 7.0M | $2.75M | 52.6 |
| 1799 | Special Trade Contractor, N.E.C.* | $ 7.0M | $2.50M | 51.7 |
| 1521 | Single Family Housing Construction | $17.0M | $2.00M | 45.3 |
| 1522 | Residential Construction, N.E.C.* | $17.0M | $9.75M | 39.0 |
| 1531 | Operative Builders | $17.0M | $1.25M | 45.7 |
| 1541 | Industrial Builders and Warehouses | $17.0M | $5.25M | 54.6 |
| 1542 | Nonresidential Construction, N.E.C.* | $17.0M | $3.50M | 64.0 |
| 1611 | Highway and Street Construction | $17.0M | $4.00M | 53.3 |
| 1622 | Bridge, Tunnel and Elevated Highway Construction | $17.0M | $1.75M | 52.6 |
| 1623 | Water, Sewer, and Utility Line Construction | $17.0M | $1.25M | 71.1 |

*N.E.C. = Not Elsewhere Classified
M = Millions of Dollars

STATEMENT BY SENATOR ALFONSE M. D'AMATO
BEFORE THE SMALL BUSINESS COMMITTEE
SMALL BUSINESS FEDERAL CONTRACTING RESTORATION ACT
APRIL 14, 1988

MR. CHAIRMAN, I WOULD LIKE TO WELCOME TO THE SMALL BUSINESS COMMITTEE THIS MORNING OUR DISTINGUISHED PANEL OF WITNESSES WHO WILL PRESENT THEIR VIEWS ON THE SMALL BUSINESS FEDERAL CONTRACTING RESTORATION ACT OF 1987, S.1559.

THE LEGISLATION WE ARE CONSIDERING TODAY WAS PROMPTED BY THE FISCAL YEAR 1989 DEPARTMENT OF DEFENSE AUTHORIZATION BILL WHICH PROPOSED A NUMBER OF CHANGES TO THE SMALL BUSINESS PROCUREMENT SET-ASIDE PROGRAMS. THE MANNER IN WHICH THESE CHANGES WERE MADE WAS UNFAIR TO MINORITY AND OTHER SMALL BUSINESSES IN THAT NO HEARINGS WERE HELD ON THE CHANGES AND THAT THE SENATE COMMITTEE'S REQUEST TO APPOINT CONFEREES WAS DENIED.

THE PROVISIONS IN THE DOD AUTHORIZATION ACT REQUIRE SBA TO REDUCE SIZE STANDARDS FOR FOUR INDUSTRY GROUPS, SO THAT ONLY APPROXIMATELY 30 PERCENT OF THE CONTRACTS WOULD BE SET-ASIDE EXCLUSIVELY FOR SMALL BUSINESS COMPETITION. THE REMAINING 70 PERCENT WOULD BE SOLICITED THROUGH UNRESTRICTED

COMPETITION. ONE OF THE FOUR AFFECTED INDUSTRIES IS CONSTRUCTION.

ONE OF THE USES OF SUCH STANDARDS IS TO DETERMINE ELIGIBILITY FOR A VARIETY OF FEDERAL SMALL BUSINESS ASSISTANCE PROGRAMS, INCLUDING THE SBA SURETY BOND GUARANTEE PROGRAM AND THE SBA LOAN PROGRAM. FURTHER, SIZE STANDARDS ARE USED IN DETERMINING ELIGIBILITY FOR MINORITY ASSISTANCE PROGRAMS SUCH AS THE SECTION 8(A) PROGRAM AND THE SECTION 12Ø7 SET-ASIDES. INEVITABLY, THE PROPOSED REDUCTION IN SIZE STANDARDS WOULD REDUCE MINORITY PARTICIPATION IN GOVERNMENT CONTRACTING.

A MAJOR PROVISION OF S.1559 ESTABLISHES A THREE YEAR DEMONSTRATION PROGRAM IN WHICH THREE DESIGNATED INDUSTRIES CAN SHOW THAT THEY CAN SUCCESSFULLY COMPETE ON AN UNRESTRICTED BASIS FOR FEDERAL CONTRACTS. IT IS ONLY FAIR THAT THESE SMALL BUSINESSES BE GIVEN A CHANCE TO PROVE THEIR VIABILITY. THEY WERE NOT GIVEN THAT CHANCE WHEN THE RESTRICTIVE PROVISIONS WERE TACKED ONTO THE DOD AUTHORIZATION BILL WITHOUT THE BENEFIT OF HEARINGS.

I LOOK FORWARD TO THE TESTIMONY OF OUR WITNESSES AND TO THE INSIGHT THEY ARE SURE TO PROVIDE THE COMMITTEE ON S.1559.

THANK YOU, MR. CHAIRMAN.

STATEMENT OF SENATOR JIM SASSER

SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988

SENATE SMALL BUSINESS COMMITTEE

APRIL 14, 1988

MR. CHAIRMAN, LET ME BEGIN BY WELCOMING A FELLOW TENNESSEAN TO THE COMMITTEE. WE ARE FORTUANTE TO HAVE AS A WITNESS THIS MORNING LESTER SMITH FROM NASHVILLE, TENNESSEE. MR. SMITH IS REPRESENTING THE COMMITTEE ON FEDERAL PROCUREMENT OF ARCHITECTURAL/ENGINEERING SERVICES. IT'S A PLEASURE TO HAVE MR. SMITH WITH US TODAY AND I LOOK FORWARD TO HIS TESTIMONY

MR. CHAIRMAN, I WANT TO COMMEND YOU FOR CONTINUING THIS COMMITTEE'S EFFORTS TO ENSURE THAT MORE PROCUREMENT OPPORTUNITIES ARE OPEN TO ALL SMALL BUSINESSES. THIS IS AN ISSUE I HAVE SOME FAMILIARITY WITH. IN FACT, I'VE WORKED CLOSELY WITH OUR RANKING MEMBER, SENATOR WEICKER, OVER IN THE APPROPRIATIONS COMMITTEE ON SEVERAL OCCASSIONS TO PROTECT THE INTERESTS OF SMALL FIRMS WHEN PURSUING CONTRACTS WITH THE FEDERAL GOVERNMENT. ONE LESSON WHICH HAS BECOME CLEAR TO ME THROUGH THESE EFFORTS IS THAT YOU HAVE TO BE CAREFUL IN HOW YOU GO ABOUT SEEKING TO PROMOTE GREATER COMPETITION.

I DON'T THINK WE WERE TOO CAREFUL IN THE 99TH CONGRESS, WHEN WE DIRECTED THE SMALL BUSINESS ADMINISTRATION TO REDUCE SIZE STANDARDS IN SEVERAL AREAS. I DON'T THINK ENOUGH ATTENTION WAS PAID TO THE FAR-RANGING RAMIFICATIONS OF SIGNFICANTLY ALTERING SIZE STANDARDS.

SIZE STANDARDS ARE USED FOR MUCH MORE THAN DECIDING WHETHER OR NOT TO SET ASIDE A CONTRACT FOR SMALL BUSINESS COMPETITION. SIZE STANDARDS AFFECT A COMPANY'S ELIGIBILITY FOR A HOST OF SMALL BUSINESS ASSISTANCE PROGRAMS. INDEED, MOST SBA LOAN PROGRAMS MAKE REFERENCE TO SIZE STANDARDS.

SO, BEFORE WE GO ABOUT MAKING THE CHANGES CALLED FOR, WE SHOULD STEP BACK AND EXAMINE THE FULL CONSEQUENCES OF THIS ACTION. THAT IS WHAT S. 1559 ATTEMPTS TO DO AND I CONGRATULATE THE BILL'S AUTHOR, SENATOR DIXON, FOR HIS DILIGENCE ON THIS POINT. THESE HEARINGS WILL AID GREATLY IN EXPLORING THE FALL-OUT FROM REDUCTIONS IN SMALL BUSINESS SIZE STANDARDS.

Senator DIXON. I want to say again that we appreciate the accommodations of the Chairman. We appreciate all of you who were kind enough to wait here briefly this morning until we could get going. Thank you for the brevity and the conciseness of your remarks.

This Committee meeting is adjourned.

[Whereupon, at 11:01 a.m., the Committee was adjourned.]

# A P P E N D I X

STATEMENT OF
HUMPHREY E. FOLK, JR., PRESIDENT
FOLK CONSTRUCTION COMPANY, INC.
MEMPHIS, TENNESSEE

Mr. Chairman and members of the Committee, I am Humphrey E. Folk, Jr., President of Folk Construction Company, Inc., which engages in dredging and rock reventment on the U.S. Inland Waterways. Folk Construction Company, Inc., has been in the dredging industry for eight years and averages about $9 million dollars in gross annual receipts. The company is qualified as a small business under the current Small Business Administration ("SBA") dredging industry size standard of $9.5 million. I present this testimony on behalf of my company as well as many other dredging companies, large and small, which are members of a coalition known as the Dredging Industry Size Standard Committee ("DISSC").

I wish to address a well-intended but ineffective governmental program -- small business set asides. Although the set aside program was conceived with the best intentions of implementing the goals of the Small Business Act -- "the preservation and expansion" of competition in the marketplace by "encourag[ing] and develop[ing] the capacity of small business" -- in fact, it is not encouraging the development of small firms in the dredging industry. I believe that the set aside program is "broke" and would like to offer support to a program that could fix it.

My company, Folk Construction, is eligible to bid on small business set aside dredging contracts, and has performed some in recent years. However, I feel that a size standard which allows a $9 million business to receive the special treatment intended to assist truly small businesses makes little sense and defeats the goals of the program.

I would prefer to see most, if not all, dredging contracts awarded in unrestricted competition. In fact, I believe that set aside protection is only necessary in industries in which the level of overall small business participation is very low. In those cases a reasonable number of set aside awards is appropriate, but the size standard must be low enough to encourage the smaller firms in the industry to enter the government market and become competitive. Then, if the balance of contracts is awarded in open competition, those small firms will be able to grow and thrive, to graduate from the set aside program and to make room for other new entrants.

Prior to enactment of the Small Business Act amendments in Section 921 of P.L. 99-591 and P.L. 99-661 ("Section 921"), the appropriate level (or "fair proportion" in the words of the Act) of small business government contracting was determined on a government-wide basis. That method of implementing the Act's "fair proportion" requirement resulted in an inequitable patchwork of set aside procurements among industries. A few industries received a disproportionately large share of small

business and Section 8(a) set aside awards, despite the fact that small firms in those industries also were being awarded large numbers of unrestricted prime contracts and subcontracts. Contributing to this problem has been the Federal Acquisition Regulation known as the "Rule of Two."1/ This regulation mandates that a contract be set aside if the contracting officer has a reasonable expectation that two or more small businesses will compete for the award. Its implementation has led to excessive numbers of set aside contracts in dredging and several other industries. Meanwhile, many other industries have had little or no small business participation.

Another problem which Section 921 sought to address was the impact of overly high size standards in certain industries. When a size standard is too high, the larger firms within the standard have an unfair advantage in competition against smaller firms for set aside contracts. The larger firms can easily out-compete the smaller firms. The result has been the conversion of the set aside program from an incentive plan for small businesses to one for large firms. The program creates an incentive for larger "small" businesses, prospering on a steady diet of set aside work, to avoid graduating from the set aside program into the open market. Some of these firms have actually become dominant in their field of operation in violation of the Small Business Act, which defines a small business as one "not dominant in its

1/ FAR 19.502-2.

field of operation." (Emphasis added) This dominance of set aside contracts by a few firms has been a tremendous disincentive for the small firms trying to break into the government market.

Congress took major steps to remedy these problems with the enactment of Section 921. Perhaps the most important change was the direction that small firms be awarded a fair proportion of government contracts in each industry category. This is a laudatory and long overdue change which DISSC wholeheartedly supports.

Section 921 also mandates size standard reductions when set aside and 8(a) awards exceed 30 percent of the dollar value of all government contracts in an industry. Size standard reductions will be calculated to reduce set asides and 8(a) awards to the 30 percent threshold level.

During SBA's rulemakings to implement Section 921, it became clear that further Congressional guidance was necessary. Some was provided in the recently enacted Department of Defense Authorization Act for FY 1988. But what is urgently needed now is further instruction on how best to ensure that a fair proportion of government contracts will be awarded to small businesses in each industry category. DISSC believes that a viable and creative solution to the current problems in the set aside program is the three-year small business pilot program now under consideration by this Committee.

We support the pilot proposal as a very promising way for the small business community, the Congress and the SBA to work together to expand small business participation in government contracting. The program would allow the SBA to examine small business participation for each test industry by agency under the existing size standards. The proposal also would permit SBA to focus extra attention on certain industries which have experienced only minimal small business participation.

As drafted, the pilot program would apply to all contracts awarded under the federal product and service codes of four test industries, but it would exempt minority set aside awards under Section 8(a) of the Small Business Act and Section 1207 of the Defense Department Authorization Act for FY 1988. We believe, however, that all contract awards in each category should be included to make the test as accurate as possible. One way to accomplish this would be to clarify the proposal's definition of "small business participation" as including all awards over $25,000 to small business made: in open competition; pursuant to the various set aside programs under Section 8(a), Section 15(a) and Section 1207; and through subcontracts, supplier contracts, and joint ventures.

Operation of the program as proposed would require each reporting agency to establish an annual goal for small business participation within each of the four test industries. Then each agency would look at its prior year's procurement activity in

such industries to determine whether the annual small business participation goal could be achieved through open competition. If the agency had fallen short of the goal in the prior year, then it would use remedial techniques to make up the expected shortfall in the coming year's awards to small business.

As proposed, the annual goal would be two hundred percent over the current rate of small business set aside awards government wide. That rate is now approximately fifteen percent which, when multiplied by two hundred percent, would result in a 30 percent goal. We believe it would be much easier administratively to legislate a single goal which would guide all the agencies involved in the test. We suggest an annual goal in the range of fifteen to thirty percent.

The way we see the program working is as follows. Let's say the annual goal is thirty percent. An agency would look back and see that its prior year data showed small businesses winning twenty percent of all contract dollars awarded in open competition for a particular industry. So, during the following year the agency would use open competition for ninety percent of its contract awards. Beyond that, the agency would employ set asides or other remedial techniques to add the needed ten percent to the twenty percent expected to be awarded to small businesses in unrestricted competition. On the other hand, if small business participation reached or exceeded the 30 percent goal in

the prior year, the agency need not use any remedial techniques to make its awards in the following year.

Each agency would have to report to the Office of Federal Procurement Policy all of its contract award data annually, including the dollar amount of any subcontract over $25,000 awarded to small business firms. We suggest that this reporting be supplemented to include data for all contracts under $25,000 in the base to produce a more accurate picture of total small business participation in government contracting. At the end of the three years, the test results would be reported to the Congress. If small business participation is high (above 30 percent) based on open competition, the Congress should then consider permanent authorization of this fair proportion approach.

The pilot program is an important step in the right direction. It will take the focus off set asides and size standards and force us all to take a hard look at actual small business participation on an industry-by-industry basis.

This program would produce important data on the enumerated industries -- data which, at least for the dredging industry, the SBA does not have. What recent information the SBA has on dredging was supplied by the Corps of Engineers and is woefully inadequate to SBA's task of accurately measuring small business participation. The important, comprehensive data on small business participation in these industries will, for the first

time, clearly delineate several aspects of small business paricipation. It will show us the total level of small business participation in government contracting and will identify how that participation is spread among contracts in open competition, set asides, 8(a) awards and subcontracts.

This data should help the SBA and contracting agencies properly target their assistance by directing efforts towards subcontracting, set asides or 8(a) awards. For the first time, it will be possible to determine whether small business procurement assistance efforts have been successful in increasing or maintaining small business participation in government contracting. The data collected will also be useful in setting appropriate size standards for industries where set asides are necessary. Finally, if the test program works as intended, it could be expanded nationwide in order to bolster small business throughout the country and strengthen our economic base.

The project offers several other advantages to the SBA. DISSC sees it as a great improvement over the current complex mechanisms required under Section 921. The reporting entity, the most knowledgeable player on the field, would maintain major control. Most importantly, each agency would be able to focus its special resources where the need is found to be -- industries which have experienced less than 30 percent small business participation. DISSC believes that the pilot program would provide greater opportunities for small business contractors --

through both open competition contracts and remedial techniques, in prime contracts and subcontracts. Small businesses would have far greater incentives to graduate into open competition, thereby making room for new entrants. Finally we would see fulfillment of the Small Business Act's goal -- expansion of competition in the marketplace to bolster the free enterprise system. We urge this Committee to act expeditiously on this important legislation.

Thank you.

STATEMENT

BY

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO

THE COMMITTEE ON SMALL BUSINESS

OF

THE UNITED STATES SENATE

ON

THE PROPOSED SUBSTITUTE FOR S.1559

THE "SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988"

APRIL 21, 1988

AGC:

- More than 32,500 firms, including 8,000 of America's leading general construction contractors, responsible for the employment of more than 3,500,000 individuals;
- 104 chapters nationwide;
- More than 80% of America's contract construction of buildings, highways, industrial facilities, and municipal-utilities.

The Associated General Contractors of America (AGC) remains the leading spokesman for the construction industry. AGC has more than 32,500 members, including 8,000 of the nation's leading general construction contractors. Collectively, these union and open shop firms perform more than 80% of the nation's contracts for the construction of buildings, highways, industrial facilities and municipal utilities.

AGC therefore regrets that the Senate Committee on Small Business denied AGC's request for an opportunity to testify on the proposed substitute for S.1559, entitled the "Small Business Competitiveness Demonstration Program Act of 1988." This request was the second one that the Committee denied in less than sixty days, without extending AGC the courtesy of a written reply. AGC could have clarified several of the issues that arose during the course of the hearing that the Committee held on April 14, 1988.

If permitted to testify, AGC would have expressed support for the proposed demonstration program. In fact, AGC expressed strong support for this kind of proposal when it appeared before the House Committee on Small Business on March 24, 1988, during the course of a hearing on Section 921 of Public Law 99-661, and its implementation. The record of that hearing includes the following:

AGC does not contend that the construction industry is the only one that has attracted a huge proportion of the federal set-asides. Indeed, Section 921 addressed not only the construction industry, but also several others.

AGC is aware that the representatives of these other industries have developed a proposal for a test/pilot program that would ... directly address the level of small business participation in federal contracts. AGC understands that the test/pilot program would work in the following way:

- the program would require no adjustment of the current size standards;
- the program would simply establish a 30% goal for **small business participation** in each of four industry categories, including construction;
- the program would also allow the federal agencies to seek to achieve this goal through open and unrestricted competition; but
- the program would require the agencies to use set-asides to the extent that they failed to achieve this goal through open and unrestricted competition.

AGC believes that small construction contractors can successfully compete, on an open and unrestricted basis, for well more than 30% of all federal construction. For that reason, AGC finds it important to note that the 30% goal for small business participation would **not** also serve as any kind of cap. As AGC understands the proposal, nothing would preclude small businesses from winning up to 100% of all federal construction contracts.

AGC strongly supports this concept, and would welcome the opportunity to discuss the details of any future bill. Indeed, AGC would encourage this Committee to work with the representatives of these other industries, and AGC itself, on a test/pilot program that would directly address the

level of small business participation.

The first and most important point is that the proposed substitute for S.1559 would directly address the level of small business participation. All too often, the debate over federal set-asides proceeds from the erroneous premise that set-asides are an end, in themselves, and are not merely a means of achieving larger federal objectives. Federal set-asides do not determine the level of small business participation in every industry category. In FY 1985, for example, federal agencies set aside 88.9% of their general construction contracts, equal to 51.5% of the total value of those contracts. During that same year, however, small businesses won 95.3% of the general construction contracts, equal to 64.7% of the total value of those contracts. Even after federal agencies had set aside huge proportions of their general construction contracts, small business men and women had the skill to increase the level of their participation, through open and unrestricted competition for the remainder of the work.

AGC notes only two glaring differences between the proposed demonstration project and the test/pilot program that AGC had in mind when it appeared before the House Committee on Small Business. The first is that the proposed demonstration project would require the goal for small business participation in each industry category to be recalculated each year, to equal "two-

hundred percent of the overall small business participation rate in the prior fiscal year, rounded to the next higher whole number." Second, the proposed demonstration project would permit certain kinds of set-asides to continue even after an agency had reached its goal for small business particiption.

The first difference requires careful analysis. On April 14, 1988, the former Director of the Office of Federal Procurement Policy (OFPP) testified that "less than 15% of federal contracts are awarded currently to small businesses." If that testimony is correct, then the proposed "two-hundred percent" equals the thirty percent that AGC supports. On the other hand, if the testimony that the current Director of OFPP delivered, during the same hearing, is correct, then the proposed "two-hundred percent" greatly exceeds the 30% that AGC supports. The current Director of OFPP testified that the overall small business participation rate for FY 1987 was "approximately 21%."

In any event, the proposed "two-hundred percent" would ratchet the designated industries' goals ever higher, as the overall rate of small business participation increased. In this regard, the Committee should note that any goal that exceeds the overall rate is one that requires the designated industries to carry more than their own weight. Any goal that exceeds the overall rate is one that requires the designated industries to compensate for other industries' shortcomings. AGC is prepared

to accept 30%, as the concensus figure that Congress endorsed when it passed Section 921 of Public Law 99-661, even though 30% is itself a goal that exceeds the overall rate of small business participation. AGC would find it difficult to accept an almost open ended commitment to carry other industries.

Finally, a fixed goal of 30% would have several administrative advantages. It would eliminate the need for each agency to recalculate its goal each year. In the process, it would eliminate several potential sources of confusion, and make it much easier for Congress to interpret the test results.

The second glaring problem is that the proposed demonstration program would permit federal agencies to continue to set aside construction contracts under Section 8(a) of the Small Business Act and Section 1207 of Public Law 99-661 even after the agencies had reached their goal for small business participation. AGC believes that the proposed demonstration program should also restrain these set-asides, so that the rate of small and disadvantaged business participation that unrestricted competition can achieve will also be determined. The construction industry is already achieving the 5% goal that Congress established when it passed Section 1207.

The Senate Committee on Small Business should also make several other technical corrections, including these:

- Section 101(b)(3) -- The Committee should confirm that "competitive negotiation" is not on a par with competitive bidding for federal construction contracts;

- Section 102(b) -- The Committee should revise this provision to require federal agencies to adjust their solicitation practices only at the start of the calendar year;

- Section 103(a) -- Apart from the language on Sections 8(a) and 1207, the Committee should revise this provision to the to confirm that federal agencies shall seek to achieve their small business goals through unrestricted competition, and shall resort to restrictions on competition only if they cannot achieve their goals in that way.

- Section 103(a) -- The Committee should also revise this provision to confirm that agencies shall assess their performance (1)on an annual basis, and (2)for each of the three industry categories -- not each product and service code within those three categories;

- Section 107(b) -- The Committee should revise this provision to confirm that it includes subcontracts, supply contracts, joint ventures, Section 8(a) set-asides, and Section 1207 set-asides.

- Section 203 -- This section should simply waive Paragraphs (2) through (5) of Subsection 3(a) of the Small Business Act for the duration of the proposed demonstration program.

If permitted to testify, AGC would also have emphasized that the distribution of federal set-asides is way out of line.

Briefly stated, the problem is that federal set-asides have accumulated in the industries that small businesses already dominate, and where federal set-asides therefore serve little or no useful purpose. The problem has become so serious that the objectives that Congress actually hopes to achieve are no longer certain.

It would be logical to assume that Congress intends federal set-asides to compensate for natural barriers to the entry to certain markets, or for other kinds of market imperfections. It would be equally logical to assume that Congress intends federal set-asides to compensate for the practical problems that small businesses may have in mastering federal procurement procedures, and the many unique federal requirements.

This kind of logic cannot, however, explain the actual record. Set-asides could partially offset the high financial costs of entry to certain markets. They could also increase the level of competition in the industries that have concentrated their total capacity. Set-asides could even give "breathing room" to small businesses that find it difficult to master all of the unique features and requirements of the federal market. The actual record reveals, however, that set-asides have accumulated in the industries that are relatively easy to enter, and that naturally tend to disperse their total capacity. Set-asides have

accumulated in the industries that are among the most competitive -- where small business can effectively compete, against all others, for a fair proportion of federal contracts.

The construction industry is, of course, the classic example. This particular industry is relatively easy to enter. An interested individual can get started with little or not capital. Emerging firms typically use credit to purchase materials. Short term loans will rent equipment, and meet the payroll. Craftsmen typically purchase their own tools. Clients may make advance payments. As early as 1963, the SBA took note of this market's very high rate of entry.

In addition, the construction industry naturally tends to disperse its total capacity across a large number of small firms.[1] Large firms participate in this market, but they are far

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[1] The federal market remains only a small proportion of the total market for construction. As a result, federal set-asides cannot themselves explain the distribution of the construction industry's capacity. On December 17, 1987, when the SBA proposed new size standards, pursuant to Section 921, the agency conceded that "Federal procurement represents only about 3 percent of all construction...." 52 Fed. Reg. 47937, 47941 (1987). The agency added that even the major adjustments that Section 921 requires have the potential to affect only "about 10 percent of a total of 500,000 construction and surveying firms listed in SBA's Small Business Data Base (SBDB)," and that "the actual number of firms directly impacted would be less than 2 percent of the 500,000 firms because not all of these firms participate in Federal procurement or SBA's financial assistance program." Id. The wide dispersion of the construction industry's capacity, across literally thousands if not hundreds of thousands of genuinely small firms, is a natural by-product of the economic forces that drive the market for construction.

from dominant. Family-owned businesses that work close to home are the general rule. The Commerce Department's 1982 Census of Construction Industries identified 450,776 construction establishments. The census also revealed that the vast majority of these establishments are genuinely small -- by anyone's standard. The census revealed that, as of 1982:

- 13% of the establishments in the construction industry had annual business receipts of **less than $25,000;**
- 24% of the establishments in the construction industry had annual receipts of **less than $50,000;**
- 41% of the establishments in the construction industry had annual receipts of **less than $100,000;**
- 66% of the establishments in the construction industry had annual receipts of **less than $250,000;**
- 80% of the establishments in the construction industry had annual receipts of **less than $500,000;** and
- 89% of the establishments in the construction industry had annual receipts of **less than $1,000,000.**

Even the SBA has long recognized that the construction industry is among the most competitive. This is nothing more and nothing less than a recognition that the market for construction is relatively easy to enter, and naturally tends to disperse the industry's capacity.

Last summer, the SBA reported to Congress on the advisability and feasibility of implementing Section 921. AGC obtained some of the raw data that the SBA used to prepare that report. That data provided the basis for AGC's earlier

discussion of the need to distinguish between federal set-asides and the level of small business participation in federal work. Once again, the data for FY 1985 reveals that small contractors successfully competed for an 6.5% of the general construction contracts awarded in that year **after** federal agencies had set aside 88.9% of these contracts exclusively for small and Section 8(a) firms. The additional contracts accounted for 13.2% of the value of all of the general construction contracts awarded in that year. Whatever the practical problems that other small businesses may have in mastering federal procurement procedures, and the many unique federal requirements, the fact remains that small construction contractors have already demonstrated they can effectively compete -- on an open and unrestricted basis -- for federal work.

In its report to Congress, on Section 921, the SBA concluded that the value of the construction contracts that federal agencies had set aside from FY 1984 through FY 1986 exceeded 30% of the total value of these contracts in 25 of the 26 SIC codes that cover the construction industry. The value exceeded 40% in 24 of the codes, 50% in 21 of the codes, 60% in 15 of the codes, and 70% in 10 of the codes. The value equalled or exceeded 80% in 8 of the codes, and 90% in 3 of the codes. **Whether federal agencies have set aside huge proportions of their construction contracts is no longer open to serious debate.**

Section 921 was a major step in the right direction, because it sought to reduce the huge proportion of federal construction that federal agencies have set aside for small and Section 8(a) firms. Whether Congress should continue to rely on Section 921, and related changes in the small business standards, as the means of reducing that huge proportion is, however, a very close question. AGC has strong objections to the way that the SBA has actually proposed to implement Section 921. To its credit, the agency has, however, recognized that the size standards only broadly influence the actual number of set asides. The preamble to the agency's proposal put the matter this way:

> The estimated impact produced by implementing the law, $2.3 billion less in set-aside contracts, rests on the critical assumption that lowering the specified size standards will cause contracting agencies to replace that amount of set-asides with unrestricted contracts. Contracting agencies will be under no direct orders to reduce set-asides. It remains to be seen whether the indirect course of lowering size standards will have the required effect of reducing set-asides by more or less than $2.3 billion. [52 Fed. Reg. at 37942.]

AGC is concerned that this "critical assumption" will fail, and that actual changes in the size standards will have a less than proportional impact on federal set-asides. Please note that Section 921 makes no reference to the Rule-of-Two. Whatever the outcome of the SBA's rulemaking proceeding, the Rule-of-Two will continue to govern the federal agencies' actual set-aside

decisions. That rule could well require the agencies to continue to set aside far more than 30% of their construction programs. It could even require the agencies to set aside contracts that equal or exceed the new size standards.

If the actual changes in the size standards have a less than proportional impact on federal set-asides, then the thousands of construction contractors that fall between the current size standards and the new ones will find that their federal markets have been significantly reduced. If the SBA implements Section 921 as it currently plans, then the provision could actually increase the number of firms that set-asides victimize.

Congress should provide stronger assurance that federal agencies will, in the future, set aside no more than 30% of the value of their construction contracts. A carefully crafted demonstration program, along the lines of the proposed substitute for S.1559, could provide that assurance.

Finally, AGC should note that the SBA has not merely proposed to adjust the size standards that apply to the construction industry. On December 17, 1987, the agency also proposed to greatly increase the number of these size standards, from 3 to 27. The circumstances that surrounded this action, and the certainty that the proposal would greatly increase the number of bid protests, and related litigation, are most troubling.

AGC expressed its opposition to a dramatic increase in the number of different size standards that apply to the construction industry well before the SBA published its proposal. Attached are copies of letters that AGC sent to the Chairperson of the SBA's Size Policy Board in April, May and August of 1987. All three letters addressed this issue. The last two letters addressed only this issue. In addition, one would expect the SBA to have a great interest in public comment on this issue, because its resolution will have a great impact on the small contractors that the SBA purports to serve and assist.

Nevertheless, the preamble to the SBA's proposal completely begged the issue. Without further explanation, the agency simply asserted that "[t]he laws direct the SBA" to establish 27 different size standards, and that "[t]he proper category to calculate an industry's percentage of set-asides" is the "SIC code associated with the contract award." 52 Fed. Reg. at 47939.

This treatment of the issue is most disturbing. AGC's letter of August 26, 1987, demonstrates precisely how and why Subsection 921(a) granted the SBA the administrative discretion to combine the data on closely related SIC codes, and to proceed with far fewer than twenty-seven size standards. AGC's letters of April 13, 1987, and May 11, 1987, correctly address the policy issues. The fact remains that federal contractors, and their

federal contracts, **almost always** cross the lines that the SBA has proposed.

Also attached is a Pre-Solicitaiton Notice from the Corps of Engineers for a recreational area. While the Corps has declared that this project falls within SIC Code 1611 (Highway and Street Construction, with a proposed size standard of $4 million), the Corps could have just as easily classified the project under any of the following SIC Codes:

1542 -- General Contractors and Nonresidential Building Construction, with a proposed size standard of $3.50m;

1623 -- Water Sewers and Pipe Lines, with a proposed size standard of $1.25m;

1629 -- Heavy Construction, with a proposed size standard of $17m; or

1731 -- Electrical Work with a proposed standard, of $1.5m.

Which firms may compete for this federal project (and the degree of competition afforded the government) appears likely to depend on the subjective decision of the contracting officer on which of these five SIC codes "best describes the nature of the procurement."

AGC notes that the Conference Report on Public Law 100-180 includes an ambiguous comment on Subsection 921(a). The analysis of Section 809 provides:

> The conferees wish to clarify that although the amendments made by Section 921(a) require size standards to be based on four-digit SIC codes, no legislative requirement mandates that an agency establish goals for small business and small disadvantaged business participation in each SIC code. [H. Conf. Rep. No. 100-446, 100th Cong., 1st Sess., at 660 (1987).]

AGC believes that this statement confirms that the SBA has the administrative discretion to combine the data on closely related SIC codes, and to implement the remainder of Section 921, without increasing the number of different size standards that currently apply to the construction industry. Section 921(a) added only one definition of "industry category" to Section 15 of the Small Business Act. That definition is equally applicable to the SBA's adjustment of the agencies' goals for small business participation. The Conference Report serves primarily to confirm that size standards "based on four-digit SIC codes" may cover several closely related codes, as the construction industry standards have for several years. The Conference Report continues:

> [I]t is perfectly acceptable for agencies, in conjunction with the SBA, and subject to the dispute resolution procedure in Section 15(g), to establish goals for groupings of related SICs. [Id.]

AGC has yet to find any legislatie history that even suggests that Congress intended the singular definition of "industry category" to have more than one meaning, or that

suggests, more directly, that Congress intended to distinguish between the SBA's adjustment of the size standards and the other agencies' goals for small business participation. Unless or until the SBA or some other party produces that kind of legislative history, AGC's interpretation should prevail.

Finally, the definition of "industry category" was, at most, peripheral to Section 809. The most plausible explanation for the ambiguity is that the authors of the Conferenc Report did not focus on the definition, and related issues, to any great degree.

Once again, AGC's letter of August 26, 1987, demonstrates precisely how and why Subsection 921(a) grants the SBA the administrative discretion to combine the data on closely related SIC codes, and to proceed with far fewer than twenty-seven size standards. AGC's letters of April 13, 1987, and May 11, 1987, correctly address the policy issues. At this point, AGC would only add:

- that the SBA can readily aggregate the data that it has already collected on each SIC code;
- that an aggregate approach to the data would have the same net effect on federal set-asides; and
- that other regulations that the SBA has proposed, on the assignment of SIC codes to specific contracts, provide additional support for AGC's conclusion that the SBA and the awarding agencies would find 27 different size standards extremely difficult to administer. See 52 Fed. Reg. 32869 (1987).

AGC would direct the Committee's particular attention to the regulations that the agency proposed on August 31, 1987, under these two headings: **"Establishment of the Size Standard"** and **"Multiple Item Procurements."** See 52 Fed. Reg. at 32887, 32888, 32891, 32893 (proposed sections 121.902, 121.908, 121.1102 and 121.1107).

The proposed regulations on single item procurements are so broadly worded that they would leave an enormous amount of discretion in the hands of federal officials. The proposed regulations require these officials to assign the SIC code "which best describes the nature of the procurement," giving "primary consideration" to four factors, and lesser consideration to several others. Under these regulations, federal officials could justify their assignment of any of a number of different SIC Codes to a federal construction contract that crossed several codes.

The proposed regulations on multiple item procurements are more definite, but also more arbitrary, and even these regulations could be manipulated. Which activity "amount(s) for the greatest percentage of total contract value" could well depend on how the awarding agency has divided its contracts, and on how the agency has drafted its contract specifications.

The SBA has not even explained whether the former or the latter would apply to construction contracts that cross SIC codes. The preamble to the SBA's recent proposal to adjust the size standards provides only that the rule to be used to determine the relevant size standard for a contract "composed of three or more special trade activities" will be "similar" to the rule that applies to multiple item procurements. 52 Fed. Reg. at 47940.

The only certainty is that the SBA's proposal of December 17, 1987, would greatly increase the number of bid protests, and related litigation. If the Senate Committee on Small Business does not proceed with its basically sound proposal for a demonstration program, then the Committee will have to ask whether the larger effort to put the federal set-asides on a sound economic foundation could support the weight of that litigation.

ATTACHMENT I

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TELEX 279 354 AGC WSH

DANA HUESTIS, *President* JAMES W. SUPICA, *Senior Vice President* PAUL EMERICK, *Vice President*

F. THOMAS WESTCOTT, *Treasurer* HUBERT BEATTY, *Executive Vice President*

April 13, 1987

Ms. Monika Edwards Harrison
Chairman
Size Policy Board
U.S. Small Business Administration
1441 L Street, N.W.
Room 600
Washington, D.C. 20416

Dear Ms. Harrison:

The Associated General Contractors of America (AGC) represents more than 32,500 construction industry firms, including 8,400 general construction contractors. Approximately 90 percent of AGC's construction contractor members are classified as small businesses, according to SBA's size standards.

AGC offers comments on the following issues raised in SBA's March 17, 1987 Advance Notice of Proposed Rulemaking:

1. Adjustment of Size Standards to Comply With 30 Percent Rule

Following SBA's review of contract award data from the Federal Procurement Data Center for Fiscal Years 1984, 1985 and 1986, AGC urges SBA to adjust the size standards for general and special trade construction to levels required to comply with the 30 percent rule mandated by Congress in P.L. 99-661.

Construction is one industry in which awarding agencies have historically set aside a disproportionate number of contracts for exclusive participation by small business firms. AGC believes that by adjusting size standards to levels most likely to result in at least 70 percent of the government's construction contract dollars being awarded without restriction, competition in the federal marketplace will be enhanced to the benefit of the entire construction industry and the govenment alike.

2. SBA Should Not Establish Several Different Size Standards For Construction

AGC urges SBA to continue to set one size standard for all nine general construction SIC categories, and one for all seventeen special trade construction categories, rather than establishing separate size standards for each SIC code. To establish different size standards for each of the various general and special trade construction categories would, AGC believes, prove far too confusing for the industry and extremely difficult for SBA and the awarding agencies to administer.

For the same reason, AGC believes it would be inappropriate for SBA to adjust the general and special trade construction size standards to account for "geographic or regional variations."

3. Subcontracting Limitations

Subcontracting limitations have traditionally been established by the federal awarding agencies, except for firms participating in the 8(a) program, which are allowed to subcontract up to 85 percent of the 8(a) contract. AGC believes it would be inappropriate for SBA to establish a subcontracting limitation which would apply, on an across-the-board basis, to all federal construction contracts. Rather, AGC believes awarding agencies should continue to establish subcontracting limitations on the individual general and special trade construction contracts they award. AGC also believes the awarding agencies should be allowed to establish appropriate subcontracting limitations on individual 8(a) program contracts.

Sincerely,

Hubert Beatty

Hubert Beatty
Executive Vice President

ATTACHMENT II


# THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TELEX 279 354 AGC WSH

DANA HUESTIS, *President* JAMES W. SUPICA, *Senior Vice President* PAUL EMERICK, *Vice President*

F. THOMAS WESTCOTT, *Treasurer* HUBERT BEATTY, *Executive Vice President*


May 11, 1987

Ms. Monika Edwards Harrison
Chairman, Size Policy Board
U.S. Small Business Administration
1441 L Street, N.W.
Room 600
Washington, D.C. 20416

Dear Ms. Harrison:

On April 13, 1987 the Associated General Contractors of America (AGC) submitted comments on SBA's March 17, 1987 Advance Notice of Proposed Rulemaking regarding adjustments to size standards applicable to certain industry categories to comply with the "30 percent rule," as required by P.L. 99-591 and P.L. 99-661.

One of the issues contained in SBA's Advance Notice, on which comments were sought, was whether "several different size standards for the same industry, based on variations in capital equipment and geography, (would) be confusing or administratively inconvenient to use."

In its comments AGC indicated that SBA should not establish several different size standards for general construction. AGC urged SBA to continue to set one size standard for all nine general construction SIC categories rather than establishing separate size standards for each SIC code. To establish different size standards for each general construction category would, AGC believes, prove far too confusing for the industry and extremely difficult for SBA and the awarding agencies to administer.

The purpose of this letter is to reinforce AGC's position that, in revising size standards to comply with the "30 percent rule," SBA should continue to set one size standard that is applicable to all general construction SIC classifications (except dredging, which should be considered separately).

To establish different size standards for each general construction SIC classification is not called for by P.L. 99-591 or P.L. 99-661; would be far too confusing for industry and the government alike; would lead to a large number of disputes over the classification of projects and the eligibility status of bidding firms; and would lead to a reduction in competition which would, in turn, increase the cost of Federal construction.

Such a proposal (i.e., setting different size standards for each general construction SIC classification) apparently assumes that general construction contractors limit themselves to a particular kind of construction work which can be easily defined. That assumption is erroneous. A review of the AGC membership list shows that the majority of firms are involved in a variety of different types of construction. The entrepreneurial and management skills which are necessary to become a successful general contractor are the same regardless of the type of general construction involved.

Once these skills are developed they increase, rather than limit the types of work that can be undertaken by a general contractor. There is no doubt that some projects can be highly specialized and thus require a particular skill, but this is where the subcontracting characteristic of construction plays a significant role. A general construction contractor who does not have the in-house capabilities to do a particular aspect of any given job can subcontract that portion to a specialty trade subcontractor.

Few construction projects involve only one type of construction. Many road and highway projects will include bridge and tunnel work as well as heavy construction or sewer work. Certainly the construction of industrial buildings and warehouses will include water, sewer, pipeline, communications and power line construction. There are very few examples of projects that are exclusively one type of construction, and in fact, most projects usually contain a substantial mix of different types of construction.

Since, under such a proposal, size standard determinations would be based on the type of work contained in a particular project, a general contractor would never truly know its status in the eyes of the government. On some projects it might be considered a small business, and would therefore be eligible to bid on contracts set-aside for small business, while on other projects it would be deemed a large business, and therefore ineligible to participate. This would lead to a great deal of confusion within the industry. It could be expected that many small businesses would not bid on projects on which they are eligible, and would even bid on some for which they are ineligible.

In summary, AGC continues to believe that the law does not require, and it would be inappropriate and counterproductive for SBA to set different size standards for each general construction SIC classification. AGC recommends the continuation of one size standard that is applicable to all the general construction classifications.

Sincerely,

Hubert Beatty

Hubert Beatty
Executive Vice President

ATTACHMENT III

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TELEX 279 354 AGC WSH

DANA HUESTIS, *President* JAMES W. SUPICA, *Senior Vice President* PAUL EMERICK, *Vice President*

F. THOMAS WESTCOTT, *Treasurer* HUBERT BEATTY, *Executive Vice President*

August 26, 1987

Ms. Monika Edwards Harrison
Chairman
Size Policy Board
U.S. Small Business Administration
Room 600
1441 L Street, N.W.
Washington, D.C. 20416

Dear Ms. Harrison:

As you will recall, I was among the industry representatives who met with you on July 30, 1987, to discuss the Small Business Administration's recent report to Congress on the "advisability and feasibility" of implementing the 1986 amendments to the Small Business Act. Among other things, Section 921[1] requires the SBA to review federal procurement data, and to lower its size standards for the construction industry, in the light of that data, "to a size that will likely reduce the number of contracts which may be set aside to approximately 30 percent of the value of contracts to be awarded...."

During the meeting, you explained that the SBA's recent report[2] segregates the procurement data for each of the four-digit Standard Industrial Classification codes that relate to general construction contracting, and suggests a different size standard for each of those 9 SIC codes, in essence, because your General

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[1]Continuing Appropriations Act of 1987, § 921, Pub. L. No. 99-591, 100 Stat. 3341, 3341-147 (1986), and National Defense Authorization Act for Fiscal Year 1987, § 921, Pub. L. No. 99-661, 100 Stat. 3816, 3926 (1986).

[2]Report on "Advisability and Feasibility of Implementing Section 921 of Public Laws 99-591 and 99-661," by the U.S. Small Business Administration, Office of Procurement Assistance, for the Committees on Armed Forces and Small Business of the U.S. House of Representatives, and the U.S. Senate (July 14, 1987).

Counsel has found that Section 921 compels the SBA to take that approach. At the end of the meeting, you also provided me a copy of your General Counsel's memorandum on the issue.[3]

The Associated General Contractors of America has already outlined the many reasons for its belief that 9 different size standards, just for general construction contracting, would be unworkable.[4] The purpose of this letter is to address the narrower legal issue that your General Counsel's memorandum has raised: whether the SBA has the discretion to continue to treat general construction contracting -- with the single exception of dredging -- as a single "industry category." Since at least 1984, the SBA has applied one size standard to general construction contractors, a second size standard to specialty trade contractors, and a third size standard to dredgers.[5]

AGC is now firmly convinced that the SBA has the discretion to aggregate the data for the 9 SIC codes that relate to general construction contracting, and to proceed with a single size standard for that "industry category." The language of Section 921(a)(2), its bearing on Section 921(f)(4), its legislative history, and the larger purposes of the 1986 amendments to the Small Business Act, all point in the same direction.

Section 921(a)(2) expressly grants the SBA the discretion to determine the industry categories that the agency will use to implement the remainder of the 1986 amendments. Section 921(a)(2) states, in unambiguous terms, that the categories "shall be determined by the [Small Business] Administration...."[6] Only four years ago, the U.S. Court of Appeals for the D.C. Circuit held that the remarkably similar language of the Davis-Bacon Act[7] grants the Secretary of Labor the substantive rulemaking authority to promulgate regulations that carry the force and effect of law. Building and Construction Trades Department, AFL-CIO v. Donovan, 712 F.2d 611 (D.C. Cir. 1983), cert. denied, 464 U.S. 1069 (1984). See also Batterton v. Francis, 432 U.S. 416 (1977). To be sure, Section 921(a)(2) limits the SBA's discretion,

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[3]Memorandum on "Legal Questions Concerning Pub. L. No. 99-591, the Continuing Appropriations Act of 1987" from Robert B. Webber to Harvey Bronstein (March 25, 1987).

[4]Letter from Hubert Beatty to Monika Edwards Harrison (April 13, 1987); Letter from Hubert Beatty to Monika Edwards Harrison (May 11, 1987).

[5]See 49 Fed. Reg. 5023 (1984).

[6]Emphasis added.

[7]40 U.S.C.§§276a et seq.

in significant ways. At the outset, however, Section 921(a)(2) grants the SBA the discretion to use its administrative expertise to determine the "industry categories" that correspond to the purposes of Section 921.

This point is most important, and ultimately, it is controlling, because nothing to be found in the remainder of Section 921(a)(2) even implies that Congress intended to limit the SBA's otherwise broad discretion to aggregate the data on closely related SIC codes, and then establish a single size standard for all of those codes. Section 921(a)(2) broadly defines "an industry category" as "a discrete group of similar goods and services"[8] and nothing to be found in the remainder of Section 921(a)(2) conflicts with the implication that the SBA may combine closely related SIC codes.

Section 921(a)(2) requires the SBA to determine industry categories "in accordance with the four-digit standard industrial classification codes...." For that reason, the SBA cannot fabricate wholly new definitions of the construction or any other industry. Rather, the SBA must begin with the SIC codes. The requirement does not, however, imply that the SBA is rigidly locked into treating each and every one of the four-digit SIC codes as a separate "industry category." Any "industry category" that uses closely related SIC codes as its basic building blocks is fully "in accordance" with the SIC codes.

Other limits on the SBA's discretion to determine "industry categories" serve primarily to suggest that Congress feared that the SBA would segment too much of American industry. The rest of Section 921(a)(2) carefully describes the narrow circumstances under which the SBA may use its discretion to segment industry categories "to a greater extent" than the four-digit SIC codes. Congress went so far as to require "evidence" that "further segmentation" is "warranted." Congress did not, by contrast, limit the SBA's discretion to combine SIC codes.

Section 921(f)(4) points in the same direction as the plain language of Section 921(a)(2). Section 921(f)(4) authorizes interested persons to "petition" the SBA to "review ... any designation of an industry category ...." This provision makes little sense if, indeed, Section 921(a)(2) rigidly locks the SBA into treating each and every one of the four-digit SIC codes a separate industry category. Interested persons could petition the SBA for relief, but the agency could grant no relief, except in the limited number of circumstances when a "further segmentation," below the four-digit SIC codes, might be warranted.

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[8]Emphasis added.

The legislative history of Section 921 is consistent with the plain language of Section 921(a)(2). The Conference Report[9] expresses no disapproval of the SBA's current approach to general construction contracting, and gives no other indication that Congress had the specific intent to deny the SBA the discretion to combine closely related SIC codes. To the contrary, the report explains that Section 921 "allows the Small Business Administration flexibility to evaluate the existing size standards and to craft actual size standards consistent with the objectives of the Act."[10]

The Conference Report also explains that at least the House conferees "agreed" that allowing federal agencies to "set-aside ... a predominant number of contracts in virtually a handful of industries" has been detrimental to small business.[11] Even the most cursory review of the SBA's recent report to Congress quickly reveals that the construction industry, as a whole, has suffered from this kind of abuse. The value of small business and Section 8(a) set-asides has exceeded 30% in 25 of 26 SIC codes that relate to construction contracting, and 8 of the 9 SIC codes that relate to the narrower category of general construction contracting. The problem is not that federal agencies have diverted set-asides from one category of construction to another. The problem is that federal agencies have diverted set-asides from other industry categories to construction as a whole.

Former Congressman Parren Mitchell's remarks on the floor of the House of Representatives are to much the same effect as the Conference Report. Indeed, the Congressman expressed his great interest in finding "the easiest and most efficient way of achieving the statutory intent for the set-aside programs."[12] Treating each and every one of the four-digit SIC codes as a separate "industry category" is obviously difficult, and inefficient. Without expressing any disapproval of the SBA's current treatment of general construction contracting, the Congressman also identified the areas where he believed the SBA needs to resort to further segmentation.[13]

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[9]H. R. Rep. No. 1001, 99th Cong., 2d Sess. (1986).

[10]Id., at 501.

[11]Id., at 500.

[12]132 Cong. Rec. H10140 (daily ed. Oct. 15, 1986)(statement of Rep. Mitchell).

[13]Id., at H10141.

Congressman Mitchell did state that the Conference Report "requires that SBA use four-digit standard industrial classification codes to define Federal industrial categories or markets."[14] He did not, however, state or imply that the SBA has to use each one of these codes as a separate "industry category." The Congressman's remark clearly leaves the SBA free to use these codes to construct larger "industry categories" that promise to achieve the statutory intent in an easier and more efficient way.

Though it technically falls outside the legislative history of Section 921, Congressman Mitchell's subsequent letter to the Acting Administrator of the SBA is also fully consistent with AGC's view that the SBA has the discretion to combine the 9 SIC codes that relate to general construction contracting.[15]

Finally, AGC would direct the SBA's attention to the larger purposes of Section 921. This letter has already addressed some of those purposes, and how they bear on the scope of the SBA's discretion. The fundamental question is whether the SBA should embrace the conclusion that Congress intended to require a plainly unworkable approach to Section 921. Did Congress, in the name of reform, intend to require an approach to reform that could easily collapse under its own administrative weight? With all due respect, AGC submits that the SBA should be most reluctant to answer that question affirmatively.

In the end, the General Counsel's memorandum is not so much in error as it is incomplete. The memorandum carefully, and correctly, concludes that Section 921(a)(2) bears most directly on the scope of the SBA's discretion. The memorandum then fails, however, to analyze that provision. AGC believes that a careful analysis of the language of Section 921(a)(2), its relationship to Section 921(f)(4), its legislative history, and the larger purposes of the 1986 amendments, would have led the General Counsel to the more precise conclusion that the SBA has the administrative discretion to combine closely related SIC codes, such as the 9 codes that relate to general construction contracting, under appropriate circumstances. AGC agrees that the SBA cannot resort to an "all-encompassing category" that cuts across all industry lines, and would subvert the purposes of Section 921.

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[14] Id.

[15] Letter from Parren J. Mitchell to Charles Heatherly (November 25, 1986).

For all of the foregoing reasons, AGC encourages you to resubmit the question of your administrative discretion to your General Counsel, for further consideration.

Sincerely,

Michael E. Kennedy
Director
Equal Opportunity
Services

cc: Mr. Gene Van Arsdale
Director, Procurement Policy
U.S. Small Business Administration

ATTACHMENT IV

LAC

OMB NO - 0000-0037

**PRE-SOLICITATION NOTICE**
***(CONSTRUCTION CONTRACT)***

| 1. PROJECT NO. | 2. DATE OF NOTICE | 3. DATE SOLICITATION DOCUMENTS AVAILABLE (Approx.) |
|---|---|---|
| DACW62-88-B-0025 | 12 February 1988 | 26 February 1988 |

*E: The project number in Items 1 and 16 may be the same as the Invitation or Proposal Number.

| 4. OFFERS TO BE RECEIVED BY (AT PLACE SPECIFIED FOR RECEIPT OF OFFERS) | A. TIME | B. DATE (Month, day, year) | 5. TIME FOR COMPLETION (Calendar days) |
|---|---|---|---|
| | 2:00 (NOON) P.M. | 30 March 1988 | 270 |

| 6A. ISSUING OFFICE (Name, address and ZIP code) | 7. PROJECT TITLE AND LOCATION |
|---|---|
| Nashville District<br>Corps of Engineers<br>P. O. Box 1070<br>Nashville, TN 37202-1070 | Leatherwood Ford Recreation Area<br>Curberland River Basin<br>Big South Fork National River and<br>Recreation Area - Kentucky and Tennessee<br><br>(Scott County, Tennessee) |
| 6B. ROOM NO. A604, Estes Kefauver Fed. Bldg.Annex | 6C. TELEPHONE NO. (Include area code) 615/736-7276 Miss Campbell |

INSTRUCTIONS a. Solicitation Documents will be issued upon receipt of your affirmative response to this Pre-Solicitation Notice by the DUE DATE set forth in Item 15. b. If a charge is required under Item 8A, your affirmative response must include a certified check, cashier's check or money order, in the applicable amount, made payable to Agency (shown in Item 9). Refund (when specified in Item 8B) will be made upon your return of the bid documents in good condition, without marks, notes, or mutilations, within 20 calendar days after the final date for receipt of offers. c. The Issuing Office, at its discretion, may make bid documents available to plan rooms of the Associated General Contractors, Chambers of Commerce, Dodge Reports, and other similar contractors' commercial service facilities. d. Bid guarantee is required with any bid in excess of $25,000. Bid guarantee shall be in the amount of 20 percent of the amount of the bid, or $3,000,000, whichever is less. For bid guarantee purposes, the amount of the bid is the aggregate of the Lump Sum Base Bid, all Alternates (if any), and the product(s) of each unit price (if any) multiplied by the applicable number of units shown on the Bid Form. e. NOTICE TO SMALL BUSINESS FIRMS. A program for the purpose of assisting qualified small business concerns in obtaining certain bid, payment, or performance bonds that are otherwise not obtainable is available through the Small Business Administration (SBA). For information concerning SBA's surety bond guarantee assistance, contact your SBA District office.

| 8A. CHARGE FOR SOLICITATION DOCUMENTS | 8B. IS THIS CHARGE REFUNDABLE? | 9. MAKE CHECK PAYABLE TO: |
|---|---|---|
| $ 20.00 | ☐ YES ☐ NO | FAO, Army Engineer Division, Ohio River |

| 10. ESTIMATED COST RANGE OF PROJECT | | 11. OFFERS COVERING THE PROJECT RESTRICTED TO SMALL BUSINESS? | 12. SUBCONTRACTING PROGRAM REQUIRED? |
|---|---|---|---|
| A. FROM | B. TO | | |
| $ 500,000 | $ 1,000,000 | ☒ YES ☐ NO *See Note Below. | ☐ YES ☒ NO |

13. DESCRIPTION OF WORK (Physical characteristics)

Development of area, including construction of roads, parking areas, trails, boardwalk, retaining walls, exterior electrical, comfort station, shelter, sanitary disposal field, and miscellaneous related items of work.

*Standard Industrial Classification Code - 1611.
Average annual receipts for preceding three years not to exceed $17 million.

DO NOT DETACH PLANS & SPECS. MAILED: _____

***IMPORTANT: FAILURE TO COMPLETE AND RETURN THIS PART OF THE NOTICE TO THE ISSUING OFFICE, ON OR BEFORE THE DUE DATE SHOWN IN ITEM 15, MAY RESULT IN YOUR NAME BEING REMOVED FROM OUR MAILING LIST.***

14. ACTION REQUESTED (Check applicable box)

| A. I AM INTERESTED IN BIDDING ON THIS PROJECT AS A: ☐ PRIME CONTRACTOR ☐ PRINCIPAL SUBCONTRACTOR | B. I AM NOT INTERESTED IN BIDDING ON THIS PROJECT. RETAIN MY NAME ON YOUR MAILING LIST. | 15. DUE DATE |
|---|---|---|
| NO. OF SET(S) YOU REQUIRE OF SOLICITATION DOCUMENTS | C. REMOVE MY NAME FROM YOUR MAILING LIST. | 16. PROJECT NO. DACW62-88-B-0025 |

17. NAME AND ADDRESS OF FIRM (City, State and ZIP code)

TELEPHONE NO. _____

Amend. No. 0001 mailed: _____
Amend. No. 0002 mailed: _____
Amend. No. 0003 mailed: _____
Amend. No. 0004 mailed: _____

| 18. NAME AND TITLE OF FIRM REPRESENTATIVE | 19. SIGNATURE OF REPRESENTATIVE | 20. DATE SIGNED |
|---|---|---|
| | | |

# Testimony of

# WASTE MANAGEMENT, INC.

## Prepared For

## The Committee on Small Business

## United States Senate

## April 14, 1988

Waste Management, Inc. appreciates the opportunity to offer its comments on the set-aside programs and proposed changes thereto. Waste Management fully supports the policies first adopted by the Congress in 1953 to assure that a fair proportion of governmetn contracts are awarded to small businesses. Those polices are as relevant and important today as they were 35 years ago. Waste Management remains concerned, however, that actual implementation of those policies has somehow been lost or forgotten by many federal agencies in an effort to meet artificial goals that do not have any relationship with the basic policies established by Congress. We are hopeful that this examination of the operation of the set-aside programs by the Small Business Committee will help reestablish the importance of those basic goals and the order of priorities in the set-aside programs.

As discussed in detail below, Waste Management views the most recent amendments to the Small Business Act as a critical and important effort to achieve the basic policy objectives of participation by small business concerns in the federal marketplace. Waste Management believes that the top policymakers at the Small Business Administration (SBA) are in agreement with the policy goals established by Congress and are now working to implement them. Waste Management recommends that SBA be encouraged to continue these efforts.

At the same time, Waste Management recognizes that the most recent amendments affecting the small business set-aside programs are not the only manner by which the basic policy objectives set by Congress can be met. Waste Management considers the proposed "Small Business Competitiveness Demonstration Program Act of 1988" ("Pilot Program") as a positive alternative to current practices and could be utilized to help eliminate existing problems.

Waste Management believes that efforts by Congress and SBA should be focused on assisting those small business concerns that are, in fact, unable to compete successfully in the federal marketplace. Federal efforts should consistently be reviewed from that perspective. The recent amendments to the set-aside programs as well as the proposed Pilot Program reflect Congress' concern that there be a small business need before assistance in the form of set-asides is provided.

For those industry categories with an already high participation of small business concerns, Congress should require SBA and other federal agencies to use their limited small business assistance program resources in other areas. The Pilot Program would begin efforts in this area. The guiding policy principle that should be maintained and applied is that each small business assistance program is a tool to help small business concerns, where needed. What must be avoided is the use of ever increasingly scarce federal resources in those industry categories where small business concerns already do very well.

As a case in point, Waste Management notes that for garbage collection contracts awarded on an unrestricted basis, with small companies competing head to head with big companies, small business concerns have won over 50 percent of the contract dollars awarded since enactment of the Competition in Contracting Act of 1984. This fact would be recognized under the Pilot Program and would permit federal resources to be focused in other industry categories where small business concerns are currently unable to compete with such a high degree of effectiveness.

Waste Management urges the Committee to revisit the Pilot Program mechanism whereby specific industry goals are set. To date, actual implementation of changes in the set-aside programs have been met with considerable confusion and in some cases, resistance, by agency personnel. It is clear that both SBA and the other federal agencies need clear, unequivocal policy guidance in this area. It would be appropriate, and administratively simpler, for Congress to establish a specific goal for small business participation in the identified industry categories during the operation of the Pilot Program.

Waste Management recommends that a goal of 30 percent be considered. That figure is both low enough to be able to determine if some of the problems with "loading" of industry categories are eliminated, and high enough to ensure that small businesses in the identified industry categories continue to receive a greater proportion of feceral contracts that the goals currently set by Federal agencies.

In addition, Waste Management recommends that the Pilot Program clearly provide for the continuation of current law concerning set-asides after the end of the Pilot Program absent action by Congress to the contrary. Waste Management fully expects that the results of the Pilot Program will demonstrate that in the identified industry categories, small businesses are very capable of competing for federal contracts. As a result, other methods recently developed by Congress and enacted into law to utilize federal resources for those businesses that need specific help should not simply be forgotten.

Background

Waste Management and its subsidiaries form a full service network of refuse systems and related services. Waste Management currently operates in 46 states as well as in 6 foreign countries providing high quality service in all aspects of refuse management at competitive prices. In addition, Waste Management companies currently compete and serve as contractors for all types of Government contracts dealing with refuse systems and related services.

Waste Management competes on a daily basis with the many small businesses that make up the refuse collection marketplace. Due to certain economic features and capital requirements, the refuse collection marketplace consists of a large number of very small refuse collection companies and a more modest number of larger refuse collection companies. Small Business Administration (SBA) statistics indicate that of the companies operating under the Standard Industrial Classification code 4212 which includes the collection and transporting of garbage and refuse, well over half (59 percent) of those companies have average annual sales of under $138,000 and have 4 or fewer employees. See Attachment 1. Those same statistics indicate that of the 33,995 firms operating under SIC code 4212, almost all (99 percent) are classified as small business concerns under current small business size standards for refuse collection. Id.

SBA statistics also indicate that in SIC code 4953, the code under which Waste Management operates because of the nature of its additional refuse disposal services, nearly two-thirds (65 percent) of the companies have annual sales of less than $381,000 and have 9 or fewer employees. Of the 2785 firms operating under SIC code 4953, almost all (98 percent) of the firms are classified as small business concerns under current small business size standards.

Historical Reference

The small business set-aside programs are based on Congressional policy that dates back to the Armed Service Procurement Act of 1947. That Act provided that small business concerns were to receive a "fair proportion" of defense-related government contracts and purchases. According to legislative history, the set-aside programs are part of an overall Congressional effort of offering assistance to small business concerns unable to compete effectively in the marketplace. The intent of those efforts, as stated in the Congressional report of the legislation establishing the Small Business Administration in 1953, is to help those firms become self-sufficient, viable businesses.

Congress expanded the scope of the set-aside programs in 1958 to allow a "fair proportion" of all Government contracts to be awarded to small business concerns. This addition was intended to put the set-aside program on a peacetime basis, permitting assistance to be given without regard to any relationship to the maintenance of full productive capacity or to war or civil defense programs. As a result, small business concerns were to be assisted by federal agencies by being awarded federal contracts upon the determination that it would:

> be in the interest of maintaining or mobilizing the Nation's full productive capacity...be in the interest of war or national defense programs...be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns...[or] be in the interest of assuring that a fair proportion of the total sales of Government property be made to small business concerns.

15 U.S.C. § 644(a). (Emphasis Added).

Current Set-Aside Practices

Management of the set-aside programs has generally been left to the SBA and federal contracting agencies. Congress has, on occasion, added statutory instruction dealing with the implementation of these programs. These additions have dealt with surety requirements, eligibility of not-for-profit organizations; priority of labor surplus areas; the role of the SBA in establishing goals for participation by small business concerns; annual reports; the set-aside of small purchases; the establishment of Offices of Small and Disadvantaged Business Utilization; and the assignment of breakout procurement center representatives. The intent of these amendments has been to focus further the attention of federal agencies on the set-aside program and to increase participation by contracting agencies.

One of the changes that has had the most profound effect on the set-aside program was the requirement that each federal agency establish, after consultation with the SBA, overall agency goals for the participation by small business concerns in agency acquisitions. In addition, creation of a specific high-level office to deal with small business issues within each agency has also added to the pressure on agency acquisition officials to set aside an increasing number of contract dollars each year for exclusive small business concern participation.

In this rush to meet yearly goals, agencies have, for the past several years, increased the practice of "loading" certain industry categories with a high percentage of set-aside contracts while failing to make the effort to ensure that small business concerns in other industry categories receive a fair share of federal contracts. For example in FY 1986, according to Federal Procurement Data System data produced at SBA's request, there were 645 Product and Service Code (PSC) categories with more than 25 initial contract actions.

In 46 of the 645 PSC categories, more than 70 percent of the total procurement dollars were set aside for exclusive participation by small business concerns. The set-aside contracts in those 46 PSC categories made up almost one-fifth (17 percent) of the total set-aside dollars awarded in FY 1986. However, in 279 of the 645 PSC categories, less than 10 percent of the total contract dollars were set aside for small business concerns. Although those 279 categories make up almost half of the categories reviewed, they account for only 22 percent of total set-aside dollars awarded in FY 1986.

The same set of data also show that it is the low-tech service and product industry categories that are being used to meet small business concern participation goals while more sophisticated industry categories such as research and development contracts are almost never awarded based on the set-aside programs. For example, as indicated in Attachment 2, of the 46 PSC categories with more than 70 percent of the total contract dollars awarded under the set-aside programs, 35 PSC categories are for services and only 9 are for products. Furthermore, of the 35 PSC service industry categories, 29 are classified either as "Housekeeping Services," (4); "Construction of Structures and Facilities," (9); or "Maintenance, Repair, or Alteration of Real Property," (16).

Of the 9 PSC product categories in the same 70 percent or above set-aside range, 4 are classified as "Clothing, Individual Equipment, and Insignia" and 2 are classified as "Textiles, Leather, Furs, Apparel and Shoe Findings, Tents and Flags." At the same time, contract dollars spent for technical services and products are set aside only sporadically. For example, 80 percent of the research and development contract dollars were set-aside less than 10 percent of the time in FY 1986.

What these data indicate is that the set-aside programs are currently being used to meet numerical goals rather than achieve policy objectives. A fair conclusion to reach is that the federal Government is using its resources to a much greater degree to assist small business concerns in the low-tech service industries in an effort to meet goals rather than using its resources to help a broad base of small business concerns such as those small businesses attempting to compete in the more sophisticated industry categories like research and development.

In 1983, this agency practice of loading certain industry categories with set-aside contracts was challenged in court. In J.H. Rutter Rex Manufacturing v. United States, 706 F. 2d 702 (1983), a manufacturer of military clothing, having gradually lost between 1976 and 1981 all of its Government business due to set-aside contracts, brought suit against the Department of Defense for allocating over 90 percent of its contracts for apparel to small business concerns. The manufacturer argued that

such a high percentage of set-asides violated the statutory requirement that a "fair proportion" of contracts be reserved for small businesses.

The Fifth Circuit, in upholding a lower court decision, could not find any statutory language or legislative history to support the manufacturer's contention that Congress intended a "fair proportion" of contracts to be reserved for small business concerns in each industry category. The Court held that because Congress had delegated broad powers to agencies to achieve statutory purposes in procurement matters and had not clearly objected to agency practices of setting aside a large percentage of contracts in certain industry categories, no violation of statute occurred where DOD set aside 90 percent of all apparel contracts.

Recent Congressional Action

Although the Rutter Rex decision served to validate agency "loading" activities, Congress has more recently concluded that such loading efforts create problems and undesirable results. The first problem found by Congress is that by setting aside the majority of federal contracts in a particular industry category, there is little incentive for small business concerns that are active in the federal marketplace to grow beyond the size limit established by the SBA. Indeed, in such an industry category, a decision to grow also becomes a decision to abandon the federal marketplace which is often the very marketplace that permitted the growth in the first place. This results from the simple fact that small business concerns that grow to exceed the SBA size standard will no longer be eligible for the contract work being set aside.

A second problem is created when small business concerns that are near the actual level of the size standard make the decision to remain as "big" small business concerns by carefully avoiding any expansion that would remove them from the classification as a small business concern. In an industry category where the current size standard is fairly high, these "big" small business concerns have the best of both the Government and commercial marketplaces; they are often better situated to compete with truly small business concerns for Government contracts that are set-aside, and at the same time can often compete successfully with large businesses for those federal contracts that are not set-aside and for contracts in the commercial marketplace. As a result, a permanent class of "big" small companies is created that take advantage of the set-aside programs while frustrating the Congressional purpose of helping small companies that are effectively unable to compete.

A third problem created by loading industry categories is the resulting "gaming" of contract work and business data to ensure that a particular size standard is not exceeded. This is done by business concerns either hiding affiliations and assets

that actually make them a large business or by subcontracting a substantial portion of the work on federal contracts to large businesses. Because the current regulations permit contract awards at a price above a fair market price, a small business concern can afford to pay a large business subcontractor a fair market price to accomplish nearly all of the contract work while still making a profit and without doing any of the work or gaining any competitive experience.

A fourth problem area results when a small business concern is unprepared to handle a particular Government contract but is nevertheless encouraged by a contracting officer interested in meeting a set-aside goal to bid on the contract in order to provide a sufficient number of small business competitors to set aside the contract. The result in this instance is that either the small business concern submits an unrealistically high bid resulting in inefficient and costly competition and contract awards or, even worse, an unqualified small business concern is awarded the contract and ends up defaulting on the contract. The small business concern loses by having to pay the business costs associated with contract default and the Government loses by having to find a short term contractor capable of performing the work, usually at sole source prices.

A final problem area associated with the practice of loading is the fact that large businesses are excluded from the Government marketplace regardless of technical capability or price competitiveness. This limits competition for the contract and can serve to increase prices paid by the Government for products and services.

In order to address the problems that have been created by loading practices while still maintaining the objectives of the set-aside program to assist small business concerns unable to compete effectively, Congress, in 1986, amended the basic set-aside programs. Those amendments accomplished four basic goals.

First, they established the clear statutory policy that a fair proportion of contracts were to be set aside in each industry category. This was done by reference to the Standard Industrial Classification codes developed by the Department of Commerce.

Second, they established that set-aside contracts were to be awarded at a "fair market price."

Third, they limited subcontracting by small business concerns awarded a set-aside contract to no more than 50 percent of the work to be performed.

Fourth, they established a pilot program in 4 industry categories: Construction; Architectural and Engineering services (including surveying and mapping services); Shipbuilding and ship

repair; and Refuse systems and related services. Congress required SBA to reduce the size standards in those 4 categories until no more than 30 percent of the total contract dollars awarded by the federal government are awarded based on the set-aside programs.

Unfortunately, due to data collection problems as well as inappropriate interpretation by SBA staff of the legislative language and intent, the objectives of the 1986 amendments have not yet been met.

SIC Codes

As part of the 1986 Amendments and as part of its efforts to solve the problems associated with the agency practice of "loading" certain industry categories, Congress established a limited program of review of size standards in four industry categories including "refuse systems and related services." Congress required SBA to reduce, if necessary, the current size standard in each listed industry category to a level that would result in 30 percent of the total contract dollars being awarded based on the set-aside programs.

Unfortunately, SBA staff concluded that the industry categories referred to in Section 921(f) had to correspond to SIC codes. SBA in its review of the industry category "refuse systems and related services" only examined the percentage of set-aside awards in SIC code 4953 -- "Refuse Systems." As a result, SBA concluded from the data examined that no more than 22.4 percent of all contract dollars being awarded in the industry category of "refuse systems and related services" was being awarded based on the set-aside programs.

SIC code 4953, "Refuse Systems" includes the following services:

Acid waste, collection and disposal;
Ashes, collection and disposal of;
Dead animal disposal; Dumps, operation of;
Garbage: collecting, destroying, and processing;
Incinerator operation;
Radioactive waste materials, disposal;
Refuse systems;
Rubbish collection and disposal;
Street refuse systems; and
Waste materials, disposal at sea.

However, as is noted in the text of the SIC Manual for SIC code 4953, "[e]stablishments primarily engaged in collecting and transporting refuse without disposal are classified in Industry 4212." SIC code 4212 is identified in the SIC Manual as "Local Trucking Without Storage," and includes the following services:

Baggage Transfer;
Carting, by truck or horse drawn wagon;
Collecting and transporting refuse, without disposal;
Debris removal, carting only;
Delivery service, vehicular;
Draying, local: without storage;
Farm to market hauling;
Furniture moving, local: without storage;
Garbage and refuse, collecting and transporting: without disposal;
Hauling by dump truck;
Hauling live poultry: on a contract or fee basis;
Local trucking, without storage;
Log trucking;
Mail carriers, contract;
Motorcycle delivery service;
Package delivery, by truck;
Parcel delivery, by truck;
Safe moving;
Star routes;
Truck rental, with drivers; and
Trucking timber.

(Emphasis added.)

By excluding those contracts awarded to refuse collection firms that are classified pursuant to SIC code 4212, SBA excluded in its first analysis and in its proposed rulemaking of December 17, 1987, a significant number of contracts and hundreds of millions of contract dollars clearly intended to be covered by the statutory language "refuse systems and related services."

SBA's exclusive use of SIC code 4953 creates two significant problems. First, it ignores the fact that SIC code 4212--"Local Trucking Without Storage" is used to identify firms engaged in "Garbage and refuse, collecting and transporting: without disposal." Indeed, the major difference between the two SIC codes as they relate to "refuse systems and related services" is that SIC code 4953 companies are engaged in either processing or disposing of refuse while SIC code 4212 companies are engaged only in the collection and transportation of refuse. As a result, all contracts for garbage collection not awarded to firms identified as turnkey refuse operations were not considered by SBA in its analysis of the industry category "refuse systems and related services."

It should be noted that SBA has recognized in the past the similarity between the refuse businesses classified by SIC code 4953 and 4212. The size standard for SIC Code 4953 companies is $6.0 million. The size standard for SIC Code 4212 companies is $12.5 million except for companies engaged in "Garbage and

Refuse, Collecting and Transporting: Without Disposal." Footnote 6 to the size standards as published by SBA states:

> SIC-4212: The component "Garbage and Refuse, Collecting and Transporting: Without Disposal" shall have a size standard of $6.0 million. This is the same size standard as SIC-4953, Refuse Systems.

By establishing identical size standards, SBA has recognized in the past that SIC code 4953 companies and SIC code 4212 companies engaged in refuse collection should be treated in a similar manner as far as the small business set-aside programs are concerned.

A second problem with the exclusive use of SIC code 4953 is created because of the manner in which SBA collected the data. The SBA data identified contracts awarded to SIC code 4953 companies regardless of whether the contract actually involved "refuse systems and related services." At the same time the data does not include any "refuse systems and related services" contracts awarded to SIC code 4212 companies or any other companies not identified by SIC Code 4953. As a result, the view presented by the SBA statistics does not represent an accurate picture of the "refuse system and related services" marketplace.

The disparity in the data used by SBA is easily shown by examining the Product and Service Code category for "Garbage Collection Services--S205." The procurement data for FY 1984-1986 indicate that 71 percent of all contract dollars awarded for garbage collection was awarded based on set-aside contracts. This compares with the 22.4 percent figure that SBA concluded was being set aside using the single SIC code 4953. As a result, merely by relying on limited data, SBA was able to change an industry category that is "loaded" with set-aside contracts to an industry category that has only a relatively modest amount of set-aside contracts. A complete breakdown of the Product and Service Code data for the category of "Garbage Collection Services--S205" is provided at Attachment 3.

Had Congress wanted to limit the 30 percent statutory requirement specifically to SIC code 4953, it would not have added the words "and related services" to the phrase "refuse systems" to indicate that all refuse contracts are to be considered and not just those contracts identified by SIC code 4953, "Refuse Systems." This conclusion is clearly supported by the basic rule of statutory construction that an agency cannot construe statutory language so that it becomes a nullity. As stated in Sutherland Statutory Construction at § 46.06,

> '[i]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....

(Footnotes omitted.) By limiting the review required by statute to only those contracts awarded to firms classified pursuant to SIC code 4953, SBA is, in fact, ignoring the meaning and effect of the phrase "and related services;" a result not intended by Congress.

Congressional Recognition of Incomplete Review

In the Conference Report to the Defense Authorization Act for Fiscal Year 1988, Public Law 100-180, the conferees, in agreeing to limited changes in the Section 921 amendments, clarified "the purpose of several of the changes to the Small Business Act made by section 921 of the Defense Acquisition Improvement Act." H. Conf. Rep. No. 100-446, 100th Cong. 1st Sess. 660 (1987). The conferees stated:

> the conferees recognize that agencies report contract awards using the product and service codes of the Federal Procurement Data System (FPDS) rather than SIC codes. For purposes of meeting the Congressional mandate that a fair proportion of awards be made in each industry category, a reasonable correlation of FPDS and service code to SIC code groupings is acceptable.
>
> The importance of relating FPDS data to SIC codes was clearly demonstrated when SBA analyzed the procurement set-aside data pertaining to the industry category of "refuse systems and related services" for the purpose of lowering the size standard in accordance with the requirements of section 921(f). SBA focused its attention on the set-aside procurement activity under one code, SIC 4953 (Refuse System), and ignored the substantial procurement activity in this industry category set-aside under SIC 4212 (Local Trucking with Storage). Had SBA reviewed the FPDS product service code S205 (Garbage Collection Services), a set-aside rate of 73 percent would have been established as opposed to the 22.4 percent figure reached by reviewing only SIC 4953. In the opinion of the conferees, corrective action appears warranted and should be reflected in the proposed SBA regulations implementing Section 921.

Id. at 661. The unmistakable conclusion of the conferees responsible initially for the enactment of Section 921 and for the most recent amendments to the set-aside programs, is that SBA erred in reviewing only data from contracts awarded to SIC code 4953 contractors and should now take "corrective action" to be reflected in "the proposed SBA regulations implementing Section 921."

Conclusion

As indicated above, Waste Management strongly endorses the basic policies of the small business programs. It believes, however, that the set-aside programs should a means of achieving certain goals and should not be a goal in themselves. Both the Government and private industry will benefit if the set-aside programs are used properly as a means of assuring a fair proportion of Government contracts across all industry categories is awarded to small business concerns. The small business concerns will benefit from the experience and financial gain of Government business and the Government will benefit from a healthier economy and industrial base in a broad spectrum of products and services.

Waste Management believes that the proposed Pilot Program as well as the most recent statutory changes to the set-aside program both achieve the purpose of viewing the set-aside programs as tools for small business assistance. Properly implemented, both will help eliminate many of the existing problems created by the practice of "loading" certain industry categories in order to meet artificial small business participation goals. Waste Management will continue to support such efforts.

1984 FIRM EMPLOYMENT AND SALES M
4-SIC: 4212 TOTAL EMPLT: 394670

| | Employment Size of Firms MM | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1-4 | 5-9 | 10-19 | 20-49 | 50-99 | 100-249 | 250-499 | 500-999 | 1,000-4,999 | 5,000-9,999 | 10,000 & OVER | TOTAL |
| Number of Firms | 19945 | 7185 | 4832 | 2146 | 494 | 158 | 29 | 18 | 3 | 0 | 1 | 33995 |
| Average Sales (0000) | 138 | 379 | 728 | 1535 | 3722 | 5762 | 14972 | 15821 | 82180 | 0 | 6889999 | 668 |
| Share of Total Sales(%) | 12.2 | 12.5 | 13.1 | 14.8 | 8.4 | 3.9 | 1.8 | 0.5 | 1.3 | 0.0 | 31.7 | 100.0 |
| Cumulative Share of Sales(%) | 12.2 | 24.6 | 37.6 | 52.3 | 60.8 | 64.7 | 66.5 | 67.0 | 68.3 | 68.3 | 100.0 | 100.0 |
| Average Employment | 2.3 | 6.5 | 12.9 | 28.0 | 63.9 | 139.0 | 325.8 | 657.7 | 2167.3 | 0.0 | 115000.0 | 11.6 |
| Share of Total Emplt(%) | 11.7 | 11.7 | 13.2 | 15.2 | 8.0 | 5.3 | 2.4 | 1.7 | 1.6 | 0.0 | 29.1 | 100.0 |
| Cumulative Share of Emplt(%) | 11.7 | 23.4 | 36.6 | 51.9 | 59.9 | 65.2 | 67.5 | 69.2 | 70.9 | 70.9 | 100.0 | 100.0 |
| Firm Sales per Employee (0000) | 61 | 59 | 56 | 55 | 58 | 42 | 46 | 22 | 38 | 0 | 52 | 54 |

1984 FIRM EMPLOYMENT AND SALES M
4-SIC: 4953 TOTAL EMPLT: 78321

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| | Employment Size of Firms MM | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1-4 | 5-9 | 10-19 | 20-49 | 50-99 | 100-249 | 250-499 | 500-999 | 1,000-4,999 | 5,000-9,999 | 10,000 & OVER | TOTAL |
| Number of Firms | 1871 | 748 | 518 | 338 | 88 | 17 | 11 | 5 | 3 | 0 | 2 | 2785 |
| Average Sales (0000) | 146 | 381 | 720 | 1866 | 4588 | 10988 | 16256 | 32850 | 54880 | 0 | 936499 | 1722 |
| Share of Total Sales(%) | 3.3 | 5.8 | 7.7 | 13.5 | 7.6 | 4.2 | 4.2 | 1.7 | 4.2 | 0.0 | 47.9 | 100.0 |
| Cumulative Share of Sales(%) | 3.3 | 9.1 | 16.8 | 30.2 | 37.9 | 42.1 | 46.2 | 47.9 | 52.1 | 52.1 | 100.0 | 100.0 |
| Average Employment | 2.0 | 6.5 | 13.2 | 29.2 | 65.7 | 147.1 | 316.0 | 599.6 | 2515.7 | 0.0 | 15500.0 | 28.1 |
| Share of Total Emplt(%) | 3.8 | 6.2 | 8.6 | 12.3 | 7.4 | 3.2 | 4.4 | 3.8 | 9.6 | 0.0 | 40.6 | 100.0 |
| Cumulative Share of Emplt(%) | 3.8 | 10.0 | 18.6 | 30.9 | 38.3 | 41.5 | 45.9 | 49.8 | 59.4 | 59.4 | 100.0 | 100.0 |
| Firm Sales per Employee (0000) | 53 | 58 | 55 | 63 | 68 | 75 | 51 | 54 | 22 | 0 | 59 | 55 |

Attachment 2

PRODUCT AND SERVICE CODES -- FY 1986 CONTRACT ACTIONS

PERCENT SET ASIDE INCLUDING 8(a)

| 0-10% | 10-30% | 30-50% | 50-70% | 70-100% |
|---|---|---|---|---|
| AC12 | AD26 | AC16 | F009 | F001 |
| AC13 | AJ11 | AC66 | H399 | F005 |
| AC21 | AJ12 | AG91 | J041 | F008 |
| AC22 | AZ12 | AJ13 | J044 | F014 |
| AC23 | F003 | AS10 | R404 | F018 |
| AC24 | F012 | F006 | R699 | P400 |
| AC26 | F015 | F010 | S209 | R604 |
| AC42 | F019 | J023 | V112 | S201 |
| AC52 | F099 | J034 | V222 | S203 |
| AC53 | F999 | R212 | W024 | S205 |
| AC61 | H999 | R213 | Y164 | S208 |
| AC62 | J019 | R303 | Y169 | V225 |
| AC63 | J020 | R307 | Y219 | Y123 |
| AC64 | J039 | R503 | Y222 | Y124 |
| AC65 | J059 | R506 | Y241 | Y139 |
| AD14 | J061 | R702 | Y244 | Y151 |
| AD91 | J063 | R703 | Z111 | Y162 |
| AD92 | L059 | S206 | Z124 | Y171 |
| AD93 | M173 | S299 | Z129 | Y215 |
| AD94 | N099 | T001 | Z161 | Y224 |
| AD95 | P999 | T006 | Z163 | Y291 |
| AD96 | Q401 | T009 | Z164 | Z119 |
| AG11 | Q522 | T012 | Z165 | Z123 |
| AH21 | R111 | T013 | Z169 | Z139 |
| AJ10 | R112 | V125 | Z171 | Z141 |
| AJ16 | R116 | V212 | Z179 | Z142 |
| AN10 | R118 | Y111 | Z182 | Z151 |
| AN91 | R119 | Y119 | Z199 | Z152 |
| AN92 | R122 | Y127 | Z214 | Z174 |
| AR10 | R124 | Y129 | Z215 | Z192 |
| AR11 | R129 | Y152 | Z241 | Z219 |
| AR20 | R214 | Y179 | Z245 | Z221 |
| AR21 | R219 | Y192 | 1620 | Z222 |
| AR30 | R301 | Y199 | 2330 | Z223 |
| AR40 | R302 | Y242 | 2510 | Z224 |
| AR90 | R399 | Y249 | 2540 | Z239 |
| AZ10 | R407 | Y299 | 3920 | Z249 |
| AZ11 | R408 | Z127 | 3950 | 1630 |
| AZ13 | R409 | Z131 | 4020 | 5510 |
| AZ14 | R411 | Z149 | 4030 | 8115 |
| AZ16 | R414 | Z153 | 4120 | 8340 |
| G004 | R421 | Z159 | 4315 | 8345 |
| G007 | R504 | Z162 | 6640 | 8405 |
| G099 | R510 | Z172 | 7360 | 8410 |

| 0-10% | 10-30% | 30-50% | 50-70% | 70-100% |
|---|---|---|---|---|
| J014 | R516 | Z173 | 8110 | 8415 |
| J015 | R529 | Z191 | 8145 | 8455 |
| J016 | R599 | Z211 | 8430 | |
| J028 | R704 | Z242 | 8465 | |
| J048 | R706 | Z244 | | |
| J049 | R799 | Z293 | | |
| J058 | S207 | Z299 | | |
| J065 | S216 | 1375 | | |
| J066 | T099 | 1450 | | |
| J070 | U001 | 1660 | | |
| J074 | V119 | 1670 | | |
| J099 | V231 | 1720 | | |
| K015 | W023 | 1730 | | |
| K099 | W038 | 1740 | | |
| L014 | Y131 | 1940 | | |
| L015 | Y141 | 2090 | | |
| L028 | Y142 | 2610 | | |
| L058 | Y149 | 3130 | | |
| L099 | Y153 | 3655 | | |
| Q201 | Y159 | 3940 | | |
| Q301 | Y161 | 4010 | | |
| Q402 | Y163 | 4330 | | |
| Q519 | Y182 | 4510 | | |
| Q999 | Y211 | 4520 | | |
| R113 | Y216 | 4530 | | |
| R114 | Y239 | 5305 | | |
| R115 | Y245 | 5306 | | |
| R117 | 1025 | 5307 | | |
| R123 | 1290 | 5340 | | |
| R211 | 1305 | 5410 | | |
| R215 | 1340 | 5420 | | |
| R216 | 1355 | 5660 | | |
| R415 | 1377 | 5680 | | |
| R419 | 1710 | 6145 | | |
| R420 | 2040 | 6210 | | |
| R424 | 2420 | 6230 | | |
| R425 | 2530 | 6510 | | |
| R497 | 2805 | 6670 | | |
| R498 | 2920 | 7125 | | |
| R522 | 2930 | 7320 | | |
| S111 | 2940 | 8140 | | |
| S112 | 2990 | 8305 | | |
| S113 | 3010 | 8315 | | |
| S114 | 3020 | 8475 | | |
| S119 | 3040 | 8945 | | |
| T011 | 3120 | 8955 | | |
| U005 | 3439 | 9390 | | |
| U006 | 3442 | 9905 | | |
| U009 | 3455 | | | |
| V115 | 3510 | | | |
| V124 | 3825 | | | |

| 0-10% | 10-30% | 30-50% | 50-70% | 70-100% |
|---|---|---|---|---|
| V221 | 3990 | | | |
| W015 | 4110 | | | |
| W058 | 4130 | | | |
| W070 | 4210 | | | |
| W074 | 4220 | | | |
| W099 | 4240 | | | |
| X111 | 4430 | | | |
| X119 | 4440 | | | |
| Z234 | 4540 | | | |
| 1005 | 4610 | | | |
| 1010 | 4710 | | | |
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| 1560 | 5640 | | | |
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| 1650 | 5815 | | | |
| 1680 | 5825 | | | |
| 2010 | 5830 | | | |
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| 2410 | 5965 | | | |
| 2520 | 5975 | | | |
| 2590 | 5985 | | | |
| 2620 | 6015 | | | |
| 2815 | 6105 | | | |
| 2825 | 6110 | | | |
| 2835 | 6115 | | | |
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| 2925 | 6150 | | | |
| 2995 | 6220 | | | |

| 0-10% | 10-30% | 30-50% | 50-70% | 70-100% |
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| 3405 | 6532 | | | |
| 3408 | 6540 | | | |
| 3411 | 6545 | | | |
| 3413 | 6636 | | | |
| 3415 | 6655 | | | |
| 3416 | 6660 | | | |
| 3417 | 6675 | | | |
| 3424 | 6685 | | | |
| 3431 | 6710 | | | |
| 3441 | 6840 | | | |
| 3445 | 6850 | | | |
| 3540 | 7105 | | | |
| 3610 | 7195 | | | |
| 3695 | 7210 | | | |
| 3805 | 7310 | | | |
| 3810 | 7530 | | | |
| 3820 | 7610 | | | |
| 3895 | 8010 | | | |
| 3910 | 8105 | | | |
| 3930 | 8135 | | | |
| 4140 | 8730 | | | |
| 4310 | 8900 | | | |
| 4320 | 8905 | | | |
| 4410 | 8925 | | | |
| 4420 | 8950 | | | |
| 4460 | 9150 | | | |
| 4470 | 9330 | | | |
| 5120 | 9520 | | | |
| 5130 | 9530 | | | |
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Attachment 3

Federal Procurement Data System

Garbage Collection Services, S205

The following is an analysis of the Federal Procurement Data System data for the Product and Service Code Category "Garbage Collection Services, S205." The report lists all contract actions for fiscal years 1984 thru 1986.

The analysis of this information indicates the following:

1. The following dollar amount was awarded:

Garbage Collection Services $217,011,000

2. Of the total contract dollars awarded for garbage collection services:

71% was awarded under the set-aside programs.

Waste Management arrived at the above figures by adding the dollar amounts listed for contracts awarded based on the small business set-aside program and 8(a) program in the Garbage Collection Services Service Code and dividing that dollar amount by the total contract dollars awarded. The following is a breakdown of those calculations by appropriate FPDS item classification, including: Method of Contracting, Competitive Solicitation Procedures, and Extent of Competition in Negotiation.

Garbage Collection Services

| | |
|---|---|
| Small Business Set-Aside - Code H | $ 29,757,000 |
| Small Business Total Set-Aside - Code A1 | 109,693,000 |
| Small Business Partial Set-Aside - Code A2 | 76,000 |
| Labor Surplus Area/Small Business Set-Aside - Code K | 1,181,000 |
| Labor Surplus Area/Small Business Set-Aside - Code A4 | 3,616,000 |
| 8(a) Program - Code N | 1,757,000 |
| 8(a) Program - Code B2 | 8,878,000 |
| Subtotal | $154,958,000 |

| | |
|---|---|
| Other Formal Advertising - Code 2 | $ 19,591,000 |
| Normal Full and Open Competition - Code A | 16,013,000 |
| Other Negotiated Competitive - Code A9 | 14,357,000 |
| Multiple Award Schedule - Code D | 25,000 |
| Labor Surplus Area Set-Aside - Code J | 523,000 |
| Labor Surplus Area Set-Aside - Code A3 | 763,000 |
| Follow-on After Competition - Code B3 | 487,000 |
| Directed Contracts for Foreign Governments - Code 5 | 30,000 |
| Tariff or Regulated Acquisition - Code 6 | 170,000 |
| Other Authorized by Statute - Code P | 71,000 |
| Small Purchase - Code M | 289,000 |
| Other Than Full and Open Competition - Code L | 1,510,000 |
| Buy Indian - Code B1 | 293,000 |
| Other Negotiated Non-Competitive - Code B9 | 7,931,000 |
| Subtotal | $ 62,053,000 |
| TOTAL | $217,011,000 |

As these figures indicate a total of $154,958,000 was awarded based on the set-aside programs during fiscal years 1984 thru 1986 out of a total of 217,011,000 contract dollars awarded in the Product and Service Code that coincides with the SIC codes that correspond to the industry category of refuse systems and related services. These figures demonstrate that at least 71 percent of the dollar value of the total contract awards for refuse systems and related services was awarded under sections 8(a) or 15(a) of the Small Business Act.

Waste Management recognizes that the data in the FPDS is imprecise, including the fact that the FPDS does not record all contracts, including small business-small purchase set-aside contracts, and may not record some contract information accurately. Waste Management believes, however, that the FPDS data, taken as a whole, is sufficiently accurate to utilize in determining the appropriate size standards as required by Section 921.

# DESIGN PROFESSIONALS COALITION

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202/347-7474 or 202/393-2426


TESTIMONY OF

KEITH J. GARNETT, P.E.

CHAIRMAN OF THE

DESIGN PROFESSIONALS COALITION

ON

THE SMALL BUSINESS

COMPETITIVE DEMONSTRATION ACT OF 1988

COMMITTEE ON SMALL BUSINESS

UNITED STATES SENATE

April 14, 1988

Chairman Dixon and Members of the Senate Small Business Committee, the Design Professionals Coalition (DPC) thanks you for this opportunity to express our views on The Small Business Demonstration Act of 1988, which was drafted as a substitute amendment to S. 1559 by you and Senators Lowell P. Weicker, Jr. and Dale Bumpers. The membership of DPC strongly supports the proposed Small Business Demonstration Act of 1988 and urges its speedy enactment.

DPC is a national association of the nation's leading Engineering, Architectural, Surveying and Mapping firms. These professions are often referred to under the term of art as Architect-Engineer or "A-E". DPC compliments you and the bill's co-sponsors for your imaginative and much needed proposal.

The Demonstration Act will provide greater small business participation throughout the Federal marketplace while encouraging and ensuring fair opportunities for firms of all sizes to compete for Federal contracts. It will end the practice of Departments and Agencies disproportionately setting-aside contracts for "so-called small businesses" in just a few industries which have high concentrations of small businesses while seemingly ignoring many other areas where small businesses could and should be encouraged to participate. It is ironic that the set-aside abuses in the designated industries which your legislation finds it necessary to address are among the most highly competitive and least in need of set-asides.

Your legislation will restore the original goal of the Small Business Act--which is "small business participation." This has been distorted by almost total reliance on set-asides by some Agencies, based upon a myth perpetuated by some inside and out of Government that small business assistance exists only in the form of set-asides. This sometimes well-intentioned though erroneous view flies in the face of often more appropriate techniques such as open competition, subcontracting, and joint venturing which enhance the real objective--Small Business Participation! DPC is not opposed to set-asides per se as its membership has long contended that various preferential contracting programs can be used to target assistance to truly small and entry level businesses, including those owned by women and minorities. We firmly believe, however, that firms of all sizes must also be allowed to compete for Federal contracts, and that set-asides should be used only where absolutely necessary.

Another salient feature of your bill is that it provides a verifiable test of the idea that small businesses in the designated industries can compete without set-asides. It would still permit Agencies to use set-asides and other remedial approaches to assure that the annual 30 percent small business participation goal is reached should that not be accomplished without them.

The Small Business Competitive Demonstration Act builds upon the considerable and significant contributions of Section 921 of P.L. 99-661 while eliminating the unworkable and controversial parts:

- It redesignates the 30 percent small business goal in Section 921 of P.L. 99-661 from "set-asides" to "participation" in order to restore the true intent of the original Small Business Act. Knowledgeable

procurement experts agree that genuine small business participation includes not just set-asides, but subcontracting, joint ventures, open competition, and all other awards made under other than open competition.

- o The bill clarifies Congressional intent that the fair-proportion concept applies directly to each reporting entity and is not an aggregate government-wide goal. Absent this requirement, there would be a tendency for individual Departments and Agencies to continue their set-aside abuses. Applying the threshold to each reporting entity will also make it easier for contracting officers to manage their programs and for businesses to plan their marketing strategies.

- o Your proposal will create greater opportunities for small business to provide many more types of goods and services by requiring each Department and Agency to place special emphasis on improving opportunities in four industry categories with historically low small business participation.

- o It builds upon the idea for a test program involving the industries designated in Section 921 as suggested in the dialogue between yourself and Karen Hastie Williams, former Head of the Office of Federal Procurement Policy and procurement expert, during her appearance before your Subcommittee on Government Contracting and Paperwork Reduction on September 21, 1987. While your bill mandates a three-year test period, we suggest that it be extended an additional year. The extra period could be used by GAO or OFPP to conduct a study of its effectiveness over the first three years to provide Congress the sorts of information which could be helpful during consideration of making the program permanent if it works as anticipated.

- o You and your colleagues recognize that implementation of the previously enacted Section 921 fair proportion requirement and your Demonstration Act to limit set-asides can not coexist with the "rule of two", Section 19.502.2 of the Federal Acquisition Regulations. Since Congress asserted that at least 70 percent of contracts must be open for competition by firms of all sizes, an unrestrained "rule of two" triggering mechanism, which can cause whole categories of procurements to be set-aside, will prevent contracting officers from meeting this Section 921 requirement. This is because, in those industries designated in your amendment and any other industries dominated by small businesses, there will almost always be at least two firms available to trigger class set-asides. You have dealt wisely with this problem by providing for a waiver of the destructive mechanism which has been mindlessly used to set-aside whole categories of procurements in the most of competitive industries.

The enormous contribution to be derived from enactment of your legislation would be a fair and equitable resolution of the contentious issues involving mis-use of set-asides and unreasonable denial of contracting opportunities that have been with us for nearly the entire decade since the passage and implementation of P.L. 95-507. It would "cut the Gordian Knot"--the combination of SBA's unrealistically high size

standards and the inflexible Federal Acquisition Regulation (FAR) "rule of two" triggering mechanism which when operating together have hurt both truly small and large companies (the latter whose only "crime" has been that they are successful) by denying both opportunities to compete. Your imaginative proposal will effectively guarantee a portion of contract opportunities for small businesses while maintaining vital eligibility for all-sized businesses to compete for at least some portion of the Federal market. The latter is critical to large businesses, for, like small ones, non-small businesses too must keep employees on the payroll, seek challenging projects, and maintain a mixed client base in order to survive and to grow.

We recognize and sympathize with this Committee's sensitivity toward how imperfectly jurisdictional questions were dealt with during the last Congress. Our members nevertheless applaud the actions of Congress which established a statutory 70 percent requirement for "open competition" in certain designated industries in Section 921 of P.L. 99-661, for it is upon this principle that your measure is based.

It is abundantly clear, however, that the "Rube Goldberg" mechanism for adjusting size standards prescribed in P.L. 99-661 as the sole method for keeping set-asides at not more than 30 percent has in practice failed to produce the expected results for our industry group and some of the other designated industries. Further, longstanding efforts to address excessive set-asides in a few industries soley through attempts at reductions of their size standards have been terribly contentious and largely unproductive as few companies want to lose their special status.

SBA's 1987 "implementation" of Section 921 and decision not to recommend lowering size standards for our industry in its Report and its five earlier attempts at rule-makings on A-E size standards between 1980 and 1986 provide ample evidence of the barrenness of this approach. When SBA finally completed a size standard reduction rulemaking for our profession in 1986, the Agency reduced the size standards for Architecture and Engineering Services, including Surveying and Mapping services (SIC codes 8711, 8712, and 8713), from $7.5 million to $2.5 million, effective August 8, 1986. While the change appears highly dramatic, the actual results are miniscule. This reclassification simply made a few hundred more companies angry by making them ineligible for set-asides without materially affecting the excessive Agency use if set-asides for this otherwise highly competitive industry category. Using SBA's own figures, 99.7 percent of all Surveyors and Mappers, 97 percent of all Architects, and 95 percent of all Engineers remain defined as SMALL!

It should also be noted that if your measure were to be speedily enacted into law, the controversial, several times delayed, and much fought over requirement for SBA to ratchet down size standards as the sole means to reduce over-concentration of set-asides in a few industries after May 31, 1988 would be eliminated.

The alternative approach of the Small Business Competition Demonstration Act is based on "real world experiences" where small businesses participate through a variety of ways besides set-asides. Recent DOD experiences also support your approach. For example, under

Public Law 98-407 the awarding of Military Construction contracts for A-E services is done largely through open competition. All such contracts below a threshold (currently $85,000 as A-E contracts are typically small) are set-aside exclusively for small businesses while those above it are open to competition by firms of ALL sizes.

The attached data for Fiscal Years 1984, 1985, and 1986, a period during which the threshold has been applied, when contrasted with earlier years where the "rule of two" was used exclusively, reveals that while the numbers of and dollar volume of contracts awarded under set-asides have fallen dramatically, the relative dollar volume and percentage of contracts won by small businesses remain relatively constant. That is because small design professional companies, as our industry associations and firms have long contended, can compete effectively without set-asides.

Small businesses in the design and construction industries are helped through subcontracting and joint-venturing. The awarding prime contracts to large firms is not necessarily disadvantageous to small concerns. In these industries there are numerous opportunities for small, women-owned, and minority-owned design businesses, which often specialize, to work for the Federal Government by teaming with larger firms. Many small companies tell us that they actually prefer such relationships, for these permit them to gain experience, gather capital, develop capabilities, and acquire staff to seek larger projects and responsibilities without having the hassle of contracting directly with Federal Agencies. An excellent example of how subcontracting has worked to the benefit of such firms is EPA's Superfund Program.

The membership of DPC appreciates this opportunity to express its views on the Small Business Competitive Demonstration Act proposed by you and Senators Bumpers and Weicker. You gentlemen are to be commended for putting forth a sound, fair, and workable approach to achieving more true small business participation and removing unnecessary barriers to non-small business efforts to compete for Government contracts. We look forward to working in partnership with the three of you and other Members of the Committee to enhance broader and more imaginative opportunities for all business--small as well as large--to compete for providing goods and services to the Federal Government. We have a few suggestions of a more technical nature which our Vice Chairman, Richard L. Corrigan, will share with your staff.

Respectfully submitted,

Keith J. Garnett, P.E.
Chairman

Attachment

ARCHITECT AND ENGINEERING AWARDS FOR CONSTRUCTION 1/
(EXCLUDING NAVAL A&E)
(AMOUNTS IN THOUSANDS)

| | TOTAL A & E | | LARGE AND SMALL BUSINESS | | | | | | SET-ASIDES | | | | SMALL DISADVANTAGED | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | LARGE | | SMALL | | PCT OF SMALL | | SET-ASIDES | | PCT OF TOTAL | | NON-8A | | 8A | | TOTAL | SM-DIS | PCT-TOTAL | |
| | ACTNS | $(000) | ACTNS | $(000) | ACTNS | $(000) | ACTN | AMT | ACTNS | $(000) | ACTN | AMT | ACNS | $(000) | ACNS | $(000) | ACNS | $(000) | ACTN | AMT |
| ARMY (Excluding Civil Function,) | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 1,551 | 82,133 | 340 | 27,577 | 1,211 | 54,556 | 78.1 | 66.4 | 42 | 4,382 | 2.7 | 5.3 | 119 | 5,619 | 4 | 130 | 123 | 5,779 | 7.9 | 7.0 |
| FY 80 | 1,275 | 76,769 | 284 | 32,735 | 991 | 44,034 | 77.7 | 57.4 | 92 | 5,016 | 7.2 | 6.5 | 94 | 3,962 | 8 | 209 | 102 | 4,171 | 8.0 | 5.4 |
| FY 81 | 1,716 | 96,517 | 254 | 25,630 | 1,462 | 70,887 | 85.2 | 73.4 | 663 | 33,252 | 38.6 | 34.5 | 174 | 7,162 | 17 | 625 | 191 | 7,787 | 11.1 | 8.1 |
| FY 82 | 2,216 | 137,984 | 230 | 36,716 | 1,986 | 101,268 | 89.6 | 73.4 | 1410 | 69,872 | 63.6 | 50.6 | 203 | 8,839 | 24 | 474 | 227 | 9,313 | 10.2 | 6.7 |
| FY 83 | 1,722 | 194,451 | 235 | 69,832 | 1,487 | 124,619 | 86.4 | 64.1 | 1,306 | 104,753 | 75.8 | 53.9 | 201 | 14,280 | 7 | 1,800 | 208 | 16,080 | 12.1 | 8.3 |
| FY 84 | 2,123 | 205,200 | 303 | 58,886 | 1,820 | 146,314 | 85.7 | 71.3 | 1,392 | 106,977 | 65.6 | 52.1 | 228 | 16,076 | 11 | 908 | 239 | 16,984 | 11.3 | 8.3 |
| FY 85 | 2,275 | 243,257 | 468 | 100,796 | 1,807 | 142,461 | 79.4 | 58.5 | 587 | 41,138 | 25.8 | 16.9 | 213 | 16,515 | 8 | 464 | 221 | 16,979 | 9.7 | 7.0 |
| FY 86 | 1,594 | 157,578 | 420 | 71,070 | 1,174 | 86,508 | 73.6 | 54.8 | 180 | 12,932 | 11.3 | 8.2 | 83 | 5,493 | 4 | 167 | 87 | 5,660 | 5.4 | 3.6 |
| CIVIL FUNCTIONS | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 476 | 47,072 | 108 | 29,833 | 368 | 17,239 | 77.3 | 36.6 | 7 | 592 | 1.5 | 1.3 | 25 | 1,036 | - | - | 25 | 1,036 | 5.3 | 2.2 |
| FY 80 | 383 | 23,260 | 98 | 9,671 | 285 | 13,589 | 74.4 | 58.4 | 16 | 1,312 | 4.2 | 5.6 | 32 | 1,060 | 4 | 600 | 36 | 1,660 | 9.4 | 7.1 |
| FY 81 | 488 | 26,982 | 114 | 12,106 | 374 | 14,876 | 76.6 | 55.1 | 79 | 3,266 | 16.2 | 12.1 | 38 | 1,002 | 7 | 252 | 45 | 1,254 | 9.2 | 4.6 |
| FY 82 | 319 | 15,295 | 99 | 7,348 | 220 | 7,947 | 69.0 | 52.0 | 109 | 3,564 | 34.2 | 23.3 | 47 | 1,080 | - | - | 47 | 1,088 | 14.7 | 7.1 |
| FY 83 | 141 | 12,675 | 29 | 3,725 | 112 | 8,950 | 79.4 | 70.6 | 83 | 5,824 | 58.9 | 45.9 | 15 | 662 | 7 | 309 | 22 | 971 | 15.6 | 7.7 |
| FY 84 | 154 | 10,022 | 18 | 1,314 | 136 | 8,708 | 88.3 | 86.9 | 117 | 6,888 | 76.0 | 68.7 | 10 | 444 | 4 | 600 | 14 | 1,044 | 9.1 | 10.4 |
| FY 85 | 183 | 14,789 | 25 | 4,477 | 158 | 10,312 | 86.3 | 69.7 | 97 | 6,673 | 53.0 | 45.1 | 6 | 280 | 1 | 100 | 7 | 380 | 3.8 | 2.6 |
| FY 86 | 137 | 14,202 | 22 | 5,456 | 115 | 8,746 | 83.9 | 61.5 | 71 | 5,118 | 51.8 | 36.0 | 6 | 501 | - | - | 6 | 501 | 4.4 | 3.5 |
| NAVY | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 1,248 | 61,736 | 107 | 7,665 | 1,141 | 54,071 | 91.4 | 87.6 | 125 | 5,258 | 10.0 | 8.5 | 73 | 2,529 | - | - | 73 | 2,529 | 5.8 | 4.1 |
| FY 80 | 1,342 | 80,123 | 95 | 8,563 | 1,247 | 71,560 | 92.9 | 89.3 | 575 | 31,921 | 42.8 | 39.8 | 140 | 6,420 | 2 | 849 | 142 | 7,269 | 10.6 | 9.1 |
| FY 81 | 1,664 | 99,249 | 143 | 17,497 | 1,521 | 81,752 | 91.4 | 82.4 | 1,229 | 67,055 | 73.9 | 67.6 | 188 | 8,720 | 2 | 105 | 190 | 8,825 | 11.4 | 8.9 |
| FY 82 | 2,234 | 139,772 | 148 | 25,811 | 2,086 | 113,961 | 93.4 | 81.5 | 1,903 | 95,091 | 85.2 | 68.0 | 282 | 12,051 | - | - | 282 | 12,051 | 12.6 | 8.6 |
| FY 83 | 1,884 | 206,834 | 241 | 64,733 | 1,643 | 142,101 | 87.2 | 68.7 | 1,472 | 122,402 | 78.1 | 59.2 | 225 | 16,446 | 3 | 189 | 228 | 16,635 | 12.1 | 8.0 |
| FY 84 | 1,816 | 179,142 | 203 | 44,676 | 1,613 | 134,466 | 88.8 | 75.1 | 1,242 | 99,015 | 68.4 | 55.3 | 214 | 16,716 | 1 | 160 | 215 | 16,876 | 11.8 | 9.4 |
| FY 85 | 1,394 | 168,360 | 306 | 36,509 | 1,688 | 131,851 | 84.6 | 78.3 | 740 | 51,529 | 37.1 | 30.6 | 297 | 19,808 | 2 | 265 | 299 | 20,073 | 15.0 | 11.9 |
| FY 86 | 1,931 | 184,016 | 368 | 49,954 | 1,563 | 134,062 | 89.9 | 72.8 | 424 | 28,169 | 22.0 | 15.3 | 243 | 19,909 | 3 | 113 | 246 | 20,022 | 12.7 | 10.9 |
| AIR FORCE | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 130 | 9,725 | 19 | 3,098 | 111 | 6,627 | 85.4 | 68.1 | 31 | 1,634 | 23.8 | 16.8 | 6 | 136 | 1 | 12 | 7 | 148 | 5.4 | 1.5 |
| FY 80 | 148 | 14,052 | 13 | 5,639 | 135 | 8,413 | 91.2 | 59.9 | 46 | 2,166 | 31.1 | 15.4 | 16 | 915 | 4 | 266 | 20 | 1,181 | 13.5 | 8.4 |
| FY 81 | 222 | 11,557 | 22 | 2,305 | 200 | 9,252 | 90.1 | 80.1 | 158 | 6,464 | 71.2 | 55.9 | 29 | 1,309 | 2 | 43 | 31 | 1,352 | 14.0 | 11.7 |
| FY 82 | 519 | 19,950 | 24 | 1,855 | 495 | 18,095 | 95.4 | 90.7 | 380 | 13,597 | 73.2 | 68.2 | 77 | 3,057 | 10 | 215 | 87 | 3,272 | 16.8 | 16.4 |
| FY 83 | 247 | 17,513 | 13 | 1,529 | 234 | 15,984 | 94.7 | 91.3 | 189 | 12,770 | 76.5 | 72.9 | 36 | 2,328 | 4 | 265 | 40 | 2,593 | 16.2 | 14.8 |
| FY 84 | 234 | 18,783 | 18 | 2,033 | 216 | 16,750 | 92.3 | 89.2 | 148 | 10,757 | 63.2 | 57.3 | 37 | 2,366 | - | - | 37 | 2,366 | 15.8 | 12.6 |
| FY 85 | 358 | 30,126 | 78 | 10,440 | 280 | 19,686 | 78.2 | 65.3 | 75 | 4,032 | 20.9 | 13.4 | 54 | 4,288 | 1 | 48 | 55 | 4,336 | 16.4 | 14.4 |
| FY 86 | 379 | 28,447 | 81 | 9,777 | 298 | 18,670 | 78.6 | 65.6 | 58 | 3,089 | 15.3 | 10.8 | 40 | 2,603 | 3 | 243 | 43 | 2,846 | 11.3 | 9.3 |
| DLA | | | | | | | | | | | | | | | | | | | | |
| FY 79 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 80 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 81 | 1 | 13 | - | - | 1 | 13 | 100.0 | 100.0 | 1 | 13 | 100.0 | 100.0 | - | - | - | - | - | - | - | - |
| FY 82 | 11 | 184 | - | - | 11 | 184 | 100.0 | 100.0 | 10 | 167 | 90.9 | 90.8 | - | - | - | - | - | - | - | - |
| FY 83 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 84 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 85 | 1 | 28 | - | - | 1 | 28 | 100.0 | 100.0 | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 86 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |

ARCHITECT AND ENGINEERING AWARDS FOR CONSTRUCTION 1/
(EXCLUDING NAVAL A&E)
(AMOUNTS IN THOUSANDS)

| | TOTAL A & E | | LARGE AND SMALL BUSINESS | | | | | | SET-ASIDES | | | | SMALL DISADVANTAGED | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | LARGE | | SMALL | | PCT OF SMALL | | SET-ASIDES | | PCT OF TOTAL | | NON-8A | | 8A | | TOTAL SM-DIS | | PCT-TOTD | |
| | ACTNS | $(000) | ACTNS | $(000) | ACTNS | $(000) | ACTN | AMT | ACTNS | $(000) | ACTN | AMT | ACNS | $(000) | ACNS | $(000) | ACNS | $(000) | ACTN | AM |
| TOTAL DOD | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 3,405 | 200,466 | 574 | 68,173 | 2,831 | 132,493 | 83.1 | 66.0 | 205 | 11,866 | 6.0 | 5.9 | 223 | 9,350 | 5 | 142 | 228 | 9,492 | 6.7 | 4. |
| FY 80 | 3,148 | 198,704 | 490 | 56,608 | 2,658 | 137,596 | 84.4 | 70.9 | 729 | 40,415 | 23.2 | 20.8 | 282 | 12,357 | 18 | 1,924 | 300 | 14,281 | 9.5 | 7. |
| FY 81 | 4,091 | 234,318 | 533 | 57,538 | 3,558 | 176,780 | 87.0 | 75.4 | 2,130 | 110,060 | 52.1 | 47.0 | 429 | 18,193 | 28 | 1,025 | 457 | 19,218 | 11.2 | 8. |
| FY 82 | 5,299 | 313,815 | 501 | 71,730 | 4,798 | 241,455 | 90.5 | 77.1 | 3,812 | 182,291 | 71.9 | 58.1 | 609 | 25,035 | 34 | 689 | 643 | 25,724 | 12.1 | 8. |
| FY 83 | 3,994 | 431,473 | 518 | 139,819 | 3,476 | 291,654 | 87.0 | 67.6 | 3,050 | 245,749 | 76.4 | 57.0 | 477 | 33,716 | 21 | 2,563 | 498 | 36,279 | 12.5 | 8. |
| FY 84 | 4,327 | 413,147 | 542 | 106,909 | 3,785 | 306,238 | 87.5 | 74.1 | 2,899 | 223,637 | 67.0 | 54.1 | 489 | 35,602 | 16 | 1,668 | 505 | 37,270 | 11.7 | 9. |
| FY 85 | 4,811 | 456,560 | 877 | 152,222 | 3,934 | 304,338 | 81.7 | 66.6 | 1,499 | 103,372 | 31.1 | 22.6 | 570 | 40,891 | 12 | 677 | 582 | 41,568 | 12.1 | 9. |
| FY 86 | 4,041 | 384,243 | 891 | 136,257 | 3,150 | 247,986 | 77.9 | 64.5 | 733 | 49,308 | 18.1 | 12.8 | 372 | 28,506 | 10 | 523 | 382 | 29,029 | 9.4 | 7. |

1/ This table presents all AAE actions (minus R216 marine A&E) that are for construction (C2 in Item 10C) for work performed in the U.S. and its possessions.

# STATEMENT OF THE

# AMERICAN CONGRESS ON SURVEYING AND MAPPING/

# AMERICAN SOCIETY FOR PHOTOGRAMMETRY AND REMOTE SENSING

# FOR THE HEARING RECORD ON THE

# SMALL BUSINESS COMPETITIVENESS DEMONSTRATION ACT

UNITED STATES SENATE
COMMITTEE ON SMALL BUSINESS

April 14, 1988

On behalf of the American Congress on Surveying and Mapping (ACSM) and the American Society for Photogrammetry and Remote Sensing (ASPRS), we appreciate the opportunity to comment on the Small Business Competitiveness Demonstration Act.

ACSM represents professionals involved in communicating the earth's spatial data through surveying and mapping science. The society's 12,000 members include those working in the private and public sector on land and geographic information systems, computer-assisted and traditional cartography, and geodetic and land surveying. ASPRS represents 8,000 professionals in the private and public sector who are actively engaged in the practice of photogrammetry, photointerpretation and remote sensing. These two national professional and technical societies operate a joint government affairs program.

ACSM-ASPRS commend the Senate Small Business Committee for working toward a viable solution to the problem of excessive small business set-asides in industries dominated by small companies. The proposed "Small Business Competitiveness Demonstration Act" is designed to test small business participation in federal procurement by requiring an industry-by-industry review of small business participation

levels. We believe the proposal the Committee is considering builds effectively on the concept of fair proportion, a principle which we strongly support.

Under current procurement practices, the truly small surveying and mapping firms must compete with the medium and large "small" firms in the industry to secure set-aside contracts. This is the result of two main factors -- the high small business definition of surveying and mapping's size standard and the interaction of the Federal Acquisition Regulation's policy for set-asides, better known as the "Rule of Two" (FAR 19.502-2).

The current SBA size standard defines a small surveying and mapping firm as one with $2.5 million or less in annual gross receipts over a three-year period. Under this size standard, 99 percent of the surveying firms in this country qualify as "small". This results in the smaller firms really needing assistance being denied the help that the set-aside program was designed to provide. This problem is compounded by the FAR policy for set-asides, known as the "Rule of Two" which requires contracts to be set-aside if the contracting officer has a reasonable expectation that two or more small businesses will compete for the award. With 99% of the industry's firms

qualified as "small" there is more than a reasonable expectation that two or more "small" firms will compete. Consequently, the vast majority of government surveying and mapping contracts have been set-aside.

With the size standard too high, the truly small firms are forced to compete against not only medium-sized firms but even some of the largest firms in the industry. Because the smaller firms cannot effectively compete against the larger, more sophisticated companies, a vast majority of the set-aside contracts are awarded to firms which could and should compete in open competition. Excessive set-asides also injure those firms which do not qualify as small businesses. For example, for fiscal year 1983, 359 Corps of Engineers surveying contracts were reviewed. Out of 359 contracts, 344 or 96% of those contracts valued at $151.6 million were set-aside. Awarded in open competition were only 15 contracts totaling $2 million representing only 1% of the total dollar value of all Corps contracts awarded that year. Undoubtedly some of those contracts could have been offered in open competition, and there would have been an excellent chance that firms qualifying as "small" would have won them.

As you can see, the dual problems of a high size standard and high levels of set-asides have created a protected class of middle-sized firms which most benefit from the set-aside program. Although the small business set-aside program was not intended to assist such companies, nonetheless set-aside work has become the mainstay for many of these firms. It also creates a disincentive for growth.

ACSM-ASPRS supported the enactment of Section 921 of P.L. 99-661 as a method to ensure that all small businesses obtain a "fair proportion" of federal set-aside contracts by industry and by agency. While Section 921 reforms have focused attention on the problem of excessive set-asides in certain impacted industries, it appears its intended goal will not be attained. Despite changes subsequent to its enactment in the 99th Congress and attempts for clarification in the 100th Congress, it is clear that major obstacles remain in the way of effectively implementing Section 921.

The Small Business Administration and the agencies have acknowledged that they anticipate difficulties in carrying out the mandates contained in Section 921 reforms.

While Section 921 has shortcomings in its implementation process, its intended goals were the basis for our support. We believe

that the fair proportion standard advocated in Section 921 would enhance small business participation in federal procurement. The standard would force contracting officers to make a greater effort to locate small businesses in other industry categories not previously utilized in the set-aside program. With the fair proportion standard in Section 921, once the 30 percent level of small business participation is met through the use of set-asides, the remaining 70 percent would be available through open competition to firms of all sizes.

Within the surveying and mapping industry, truly small firms are currently competing with 99% of the firms in the industry. For this reason, we do not believe that the fair proportion standard would reduce the overall level of small business participation for our industry. We are confident that those firms which are currently obtaining federal contracts under the small business set-aside program would be successful in securing federal contracts through open competition. The major obstacle to implementing the fair proportion standard in Section 921 is that no modifications have been made to the "Rule of Two"(FAR 19.502-2). Therefore, 70 percent of federal contracts which should be available through open competition to firms losing their small business status, would most likely still be set

aside. It is clear that set-aside abuses will not be corrected with government reliance on size standard changes alone.

On a positive note, through the enactment of Section 921, Congress acknowledged that set-asides are intended as a special tool to assist small businesses to compete for federal contracts until they achieve the financial capability to compete on an unrestricted basis. Congress also recognized that the small business set-aside program is not the only way to quantify small business participation in the federal procurement market.

In that context, ACSM-ASPRS support the innovative concept of a pilot proposal such as the Committee proposed in the "Small Business Competitiveness Program." We endorse the concept of "small business participation" whereby unrestricted competition would increase procurement opportunities for all companies in industries which are dominated by small businesses. We favor a defined small business participation goal for the surveying and mapping industry which reflects a fair proportion of small contract awards. We advocate the use of a definition of small business participation which includes contracts let in open competition and set-asides.

Once the agencies achieve the industry small business participation goal, the program should require unrestricted competition for federal procurement contracts. If the goal is not met, then agencies should be allowed to use set-asides and other special tools to meet their goal. The advantage of the competition demonstration program is that it would not preclude small business from winning 100% of all contracts awarded by any agency in open competition.

While we do not anticipate a drop in the overall level of contracts awarded to small businesses in our industry, we do applaud the committee for targeting the expansion of small business participation in those industries which have been historically underutilized in the federal procurement process.

While ACSM-ASPRS strongly approve the concept the Committee is considering, we would like to offer some suggestions to improve the effectiveness of the proposal.

First, we recommend that Section 8(a) and section 1207 set-asides be included in the demonstration program to broaden the measure of small business participation. To exclude these contracts would be inappropriate in a test program designed to assess the impact of procurement through unrestricted competition.

We strongly recommend that subcontracts, supplier contracts and joint ventures be included in the definition of small business participation. Subcontract work in the federal market for surveying and mapping services is substantial and increases the small business participation level for our industry.

We advocate a well defined goal for small business participation at the 30 percent level of the total dollar volume for each industry. This would build on the fair proportion standard adopted in section 921. In the Committee's proposal the small business participation goal has been determined as two hundred percent of overall small business participation in the prior fiscal year, rounded to the next higher number. For the first year, the calculation is anticipated to closely track the 30 percent goal we have recommended. Our concern, however, lies in the uncertainty of the impact of this calculation in the later years of the pilot program as the overall level of small business participation increases. In addition, we believe that the use of the same goal for each agency for the entire term of the pilot program would provide a simple administrative mechanism.

With respect to calculating the small business participation of each industry, we urge the committee to clearly state that the program should reflect contract awards made in aggregate to the groups defined under all relevant product and service codes.

This method of calculation will provide an accurate basis of contract awards from which future decisions concerning industry small business participation levels can be made.

ACSM-ASPRS support the program requirement that agenices monitor attainment of industry small business participation goals on a quarterly basis. We do believe, however, that the Committee needs to make a clear distinction that monitoring is to be undertaken quarterly but determination on whether an agency achieves its small business participation goal is to be made annually.

Finally, ACSM-ASPRS urge that the Committee prohibit SBA from implementing the suggested small business size standard change for surveying proposed during implementation of Section 921. After May 31, 1988, the SBA has authority to proceed with its final rule. ACSM-ASPRS believe a size standard change at this time, while a viable alternative to our excessive set-aside problem is being seriously considered, would create an unnecessary disruption within our industry.

We further urge that the Committee review the results of the three-year pilot test program and recommend permanent changes in law if a significant increase in small business participation levels occur as we anticipate.

In conclusion, ACSM-ASPRS appreciate the Committee's willingness and innovation in addressing the problem of excessive set-asides in certain industries such as surveying and mapping. We endorse the concept you have proposed and are ready to provide assistance to the Committee in working toward the adoption of a pilot test program.